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No. 80-21

In the Supreme Court of the United States

October Term, 1979

HEART MINISTRIES, INC.; VICTORY VILLAGE HOME FOR GIRLS; WILLIAM COWELL AND CAROL COWELL, AS DIRECTORS AND OPERATORS OF VICTORY VILLAGE HOME FOR GIRLS, AND AS INDIVIDUALS,
Appellants,

vs.

STATE OF KANSAS, EX REL., JOSEPH P. O'SULLIVAN, COUNTY ATTORNEY, RENO COUNTY, KANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether, when balancing the appellants' Free Exercise rights under the First and Fourteenth Amendments to the United States Constitution against the State's interest, as *parens patriae*, a failure to recognize the appellants' genuinely held religious conviction that around-the-clock physical care of children is a totally religious, and in no way a secular activity, violates the Establishment Clause of the First and Fourteenth Amendments to the United States Constitution.

2. Whether K.S.A. 65-504, -505, -508, and the regulations of the Kansas Department of Health and Environment adopted thereunder setting forth the requirements for obtaining a residential home license, other than those under K.S.A. 65-508 pertaining to the inspection and certification of the physical surroundings, as applied to appellants, violate the rights guaranteed to them under the First and Fourteenth Amendments to the United States Constitution.

3. Whether the action of the Supreme Court of the State of Kansas in requiring appellants to obtain a residential home license as a prerequisite to determining appellants' religious objections to the rules and regulations for operating a licensed residential home, where the Trial Court found that compliance with application procedures would cause a departure from appellants' religious convictions, is inconsistent with the First and Fourteenth Amendments to the United States Constitution.

4. If this Court takes jurisdiction of this appeal, appellants reserve for argument the following question:

Whether K.S.A. 65-501, et seq., and the regulation of the Kansas Department of Health and Environment pertaining to homes for children and the placement of children therein, are unconstitutional as applied to appellants under the rights guaranteed by the First and Fourteenth Amendments to the United States Constitution and under Section Seven of the Kansas Bill of Rights of the Kansas Constitution.

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In the Supreme Court of the United States

October Term, 1979

HEART MINISTRIES, INC.; VICTORY VILLAGE HOME FOR GIRLS; WILLIAM COWELL AND CAROL COWELL, AS DIRECTORS AND OPERATORS OF VICTORY VILLAGE HOME FOR GIRLS, AND AS INDIVIDUALS,
Appellants,

vs.

STATE OF KANSAS, EX REL., JOSEPH P. O'SULLIVAN, COUNTY ATTORNEY, RENO COUNTY, KANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

JURISDICTIONAL STATEMENT

Appellants appeal from the final order and judgment of the Supreme Court of Kansas entered on April 9, 1980, denying appellants' petition for rehearing, and its judgment entered on March 1, 1980, affirming a Trial Court judgment of the District Court of Reno County, Kansas, sustaining, against federal constitutional challenge, the licensing procedures of the Kansas Department of Health and Environment pertaining to homes for children.

THE OPINIONS BELOW

The opinion of the Supreme Court of Kansas is reported at 227 Kan. 244, 607 P.2d 1102, and appears herein as Appendix A. The opinion of the District Court of Reno County, Kansas, is unreported, and appears herein as Appendix B.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

This action was instituted by appellee in the District Court of Reno County, Kansas, under K.S.A. (1976 Supp.) 60-901, 60-902, 60-903 and 65-501 et seq., to enjoin appellants from operating or maintaining a boarding home for juveniles under the age of sixteen years, until appellants obtain a valid license issued by the State Department of Health and Environment. The appellants challenged the state statutes and administrative rules under which the State Department of Health and Environment issues such licenses as invalid in their application to them.

The judgment of the Supreme Court of Kansas (App. A, *infra*, p. ~~A23~~ 21) was entered on March 1, 1980. A timely filed motion for rehearing was denied April 9, 1980. A notice of appeal to this Court was filed in the Supreme Court of Kansas and in the District Court of Reno County, Kansas, on June 13, 1980.

The jurisdiction of this Court is invoked under 28 U.S.C., §1257(2). Cases that sustain the jurisdiction of the Court include *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282 (1921); *Nashville C. & St. L. Ry. v. Walters*, 294 U. S. 405 (1935).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Constitution of the United States, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

Constitution of the United States, Amendment XIV:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

Article 7, Bill of Rights, Kansas State Constitution:

"The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode of worship . . ."

The validity of K.S.A. (1976 Supp.) 65-504, -505, and -508, and the rules adopted thereunder by the State Department of Health and Environment is here involved. Section 65-504 of the Kansas Statutes Annotated provides in part, and as most pertinent to this case, as follows:

> "The secretary of health and environment shall have the power to grant license to a person, firm, corporation or association to maintain . . . a home for children under sixteen (16) years of age . . . [T]he

secretary of health and environment shall grant no license in any case until careful inspection of the . . . home for . . . children shall have been made according to the terms of this act; and until such . . . home for . . . children has complied with all the requirements of this act. No license shall be granted without the approval of the secretary of social and rehabilitation services.

In all cases where the secretary of social and rehabilitation service deems it necessary, an investigation of said home shall be made under the supervision of the secretary of social and rehabilitation services or other designated qualified agents . . . For that purpose and for any subsequent investigations they shall have the right of entry and access to said home and to any information deemed necessary to the completion of said investigation . . ."

Section 65-505 provides:

"65-505. License Fees. The fee for license to conduct a maternity hospital or home for infants or children shall be two dollars ($2), except that for a hospital or home which contains provision for five or more inmates the fee shall be five dollars ($5), which shall be paid to the secretary of health and environment before the license is issued, and the secretary of health and environment shall on or before the tenth day of each month pay into the state treasury all such fees collected for license during the preceding month".

Section 65-508 provides in pertinent part:

". . . The secretary of health and environment with the cooperation of the secretary of social and rehabilitation services is hereby authorized and empowered to make further regulations as may be found

necessary to protect the lives, health and welfare of inmates or employees of a maternity hospital or home, or home for infants or children".

The relevant portions of the rules of the State Department of Health and Environment provide:

K.A.R. 28-4-80:

1). Social Services. There shall be a specific plan for the provision of social services for each child in care. Social services shall be provided by a private or public social agency, or through an approved social worker on the center staff.

. . .

2)B). Discipline. Discipline which is humiliating or frightening or physically harmful to the resident shall not be used at any time. The resident shall be protected against all forms of neglect, exploitation, or degrading forms of discipline. No resident shall be confined in any dark space nor isolated without an adult available to him. Corporal punishment shall not be used.

3). Education. Every resident shall be helped to secure the maximum amount of education of which he is capable and be provided the optimum conditions under which he can receive the greatest benefit from his school experience. Alternate formal schooling provided by the residential center shall be accredited by the Kansas State Department of Education.

4). Religion. Each resident shall be given the opportunity to develop the foundation for a religious faith.

Sections 65-504 and 65-508 of Kansas Statutes Annotated and other Kansas statutory and Kansas Department of

Health and Environment rule provisions, the validity of which is challenged, are set out in full in Appendix D to this Statement (p. A65, *infra*).

STATEMENT OF THE FACTS OF THE CASE

Appellants comprise a Christian, religious group, located in Reno County, Kansas. One of their ministries encompasses the caring for minor girls, including education. The appellants' school utilizes the Accelerated Christian Education program, which is not accredited by the State, nor do appellants seek State accreditation. The entire curriculum is biblically centered so as to educate in terms of the Bible's commands. The minor children are brought to appellants for religious schooling and care at the request of their parents.

On June 22, 1977, the appellee filed an action in the Reno County District Court requesting injunctive relief against appellants to enjoin them from operating a home for juveniles under the age of 16 years until such time as they had obtained a valid license issued by the State Department of Health and Environment. The appellants filed an answer setting out all of their religious ministries and practices, and raised constitutional objections to the licensing requirements of the State. After a pretrial conference and the formation of issues, the matter was tried to the Court on November 14, 1977, and concluded on November 18, 1977.

At the time of trial, the appellant, William Cowell, testified in regard to his personal religious convictions and all of the religious aspects of Heart Ministries, Inc., including the care and education of juveniles. His testimony was that the Bible contains instructions and standards as to how one's daily life should be conducted, and

that the answers to all problems are revealed in the holy scriptures. He further testified that Heart Ministries, Inc., conducted all of the activities, including the care and education, of juveniles in compliance with its religious convictions. He then testified as to each State regulation that was contrary to the religious convictions and practices of Heart Ministries, Inc., and specified the Biblical passages upon which those convictions were based.

The Trial Court took the matter under advisement, and on April 21, 1978, filed its Memorandum Decision holding that all of the State statutes regarding homes for children, as defined in K.S.A. 65-502 and -503, were constitutional as applied to the appellants, and permanently enjoined appellants from maintaining, or holding themselves out to the public as operating and maintaining, a home for girls under the age of 16 years. The Court found in its Findings of Fact that requiring the appellants to comply with the rules and regulations of the Department of Health and Education, as it applies to boarding homes, maternity homes, and placement agencies, would cause them to depart from their religious convictions. The Judgment of the Trial Court was timely appealed to the Supreme Court of the State of Kansas, and the decision of the Trial Court was affirmed. A Motion for re-hearing was also timely filed and was denied by the Kansas Supreme Court without comment.

Appellants' Answer, which was filed in response to the original Petition filed in the District Court, affirmatively raised the following federal questions:

THIRD DEFENSE

. . .

20. As a further and separate defense, the defendant, Heart Ministries, Inc., states that it is protected

by the First Amendment and the Fourteenth Amendment to the United States Constitution and that the acts of the plaintiff are unconstitutional attempts to deny those basic fundamental rights provided by said amendments to the United States Constitution.

A formal pre-trial conference was conducted by the Trial Court and a Pre-Trial Order containing the following federal questions was entered:

1. Whether K.S.A. 501 et seq is unconstitutional on its face, and as it applies to the defendants by violating their rights, privileges, and immunities under the First, Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States, and Section 7 of the Kansas Bill of Rights.

2. Are regulations of the Department of Health and Environment currently in effect as they apply to maternity homes and hospitals, homes for children under 16, including foster homes, boarding homes, and residential centers, and child placement agencies unconstitutional on its face and as applied to the defendants by violating their rights, privileges and immunities under the First, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States and Section 7 of the Kansas Bill of Rights.

3. Whether K.S.A. 1976 Supp. 38-1201 and 38-1202 are unconstitutional as violating the privileges and immunities clauses of the Fourteenth Amendment and Commerce Clause.

After the decision of the Trial Court upholding the constitutionality of the regulations and statutes in question, appellants perfected an appeal containing the following constitutional questions as grounds for reversal of the lower Court's judgment:

I. Whether the Trial Court erred as a matter of Law in making its findings of fact that there was a compelling state interest justifying the regulation of defendants' religious freedoms and that that interest cannot be otherwise served by some less restrictive measures.

II. Whether the Trial Court erred as a matter of law in concluding that K.S.A. 65-501, et seq., and the regulations of the Kansas Department of Health and Environment pertaining to homes for children, and the placement of children therein, were not unconstitutional as applied to defendants under the rights guaranteed defendants by the First and Fourteenth Amendments to the United States Constitution and under Section 7 of the Kansas Bill of Rights of the Kansas Constitution.

These constitutional issues were orally argued before the Supreme Court. The Supreme Court rejected all of the appellants' contentions, and affirmed the ruling of the Trial Court, but recognized that to require the appellants to comply with the Kansas licensing statutes and regulations would cause them to depart from their religious convictions.

The State Supreme Court, in its written opinion, addressed the issues which are presented in this appeal as follows:

AS TO QUESTION PRESENTED #1:

"Reverend Cowell testified that he believes that 'everything we do twenty-four hours a day, seven days a week, in the parsonage, in the church, on the grounds, and Victory Village, or wherever we go from there, is covered by convictional commandment from God's Word, the Bible'. Victory Village Home for Girls is one aspect of the total ministry. Other as-

pects include the church, the school for girls, counseling the girls as well as others, evangelism, and the radio ministry".

. . .

"Appellant is equating the operation of homes for children, usually a secular activity, with the dissemination of religious ideas. The teaching of religious doctrine to children simply cannot be equated with every aspect of the physical care of children on an around-the-clock basis for First Amendment purposes".

AS TO QUESTION PRESENTED #2:

"The statutes and regulations to which the defendants object are all designed to protect, in one way or another, the children who are cared for in homes other than those provided by their parents. The licensing and inspection, as well as the myriad regulations, are concerned with the care and well being of the children—their shelter, health, diet, safety, education, and general welfare are of prime concern".

". . . We hold that the State has a legitimate, vital interest in private establishments which provide residential care for children, and that interest is sufficient to warrant licensing, together with reasonable inspection and regulation".

". . . Absent the existence of licensing procedure, applicable to sectarian and nonsectarian establishments alike, the State lacks essential knowledge required for the exercise of its power and duty to protect children from physical and mental harm. Absent licensing, the fire and safety regulations, with which defendants are willing to comply, could not be effectively enforced and their purpose would be compromised".

"The compelling interest of the State, as *parens patriae,* is the protection of its children from hunger, cold, cruelty, neglect, degradation, and inhumanity in all its forms. To fulfill this responsibility, the legislature has elected to impose licensing and inspection requirements. To these requirements the defendants' free exercise rights must bow; the balance weighs heavily in favor of those unfortunate children whom the State must protect".

AS TO QUESTION PRESENTED #3:

". . . Since we hold that licensing is necessary and the fee reasonable, and defendants have no intention of becoming licensed, the reasonableness of each and every regulation as balanced against defendants' religious objections need not be determined".

"The appellants have not applied for a license; they have no license. As we have held above, a license is a prerequisite to the operation of the various child care facilities and services defendants operating or performing. The trial court's grant of injunctive relief was proper".

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This appeal concerns the right of religious persons to create a totally religious environment for children, secluded from all worldly matters, in which the basic tenets of the Bible are taught and practiced. As part of the training provided, the Accelerated Christian Education Program is offered. Presently over 3,000 schools offer this course. The questions presented by this appeal are of substantial importance to religious schools and homes for children which are rapidly growing in number.

1. The question of whether a state agency or a court can determine the truth or falsity of appellants' religious beliefs is squarely raised herein. The precedent established by this Court not only does not support the decision of the Supreme Court of Kansas, but requires its reversal.

In *United States v. Ballard,* 322 U. S. 78 (1944), the Court held all questions pertaining to the truth or falsity of the respondent's religious beliefs were properly withheld from the jury. The only factual question to be resolved was the sincerity of the religious beliefs. The Court stated (p. 87):

> "The Fathers of the Constitution were not unaware of the varied and extreme view of religious sects . . . The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain".

The testimony at trial and the findings of the Trial Court reflect that appellants sincerely believe, under the dictates of Biblical scripture, that their totally religious environment encompasses all aspects of the care of children. The Kansas Supreme Court entered the "forbidden domain" when it determined that around-the-clock physical care of children cannot be a purely religious activity.

In *Equal Employment Opportunity Commission v. Southwestern Baptist,* 485 F. Supp. 255 (N. D. Tex. 1980), the Court recognized "a virtually cloistral environment" had been created in which employment practices were an essential part. The Court stated (p. 261):

> "Its employment decisions, steeped in a perception of divine will and inseparable from its mission, become

matters of religious prerogative and warrant the fullest protection from governmental supervision".

It is this recognition of truly held beliefs that appellants seek, so that their interests can be properly balanced against those of the State.

In its opinion, the Kansas Supreme Court, in dicta, suggests that appellants should avail themselves of the administrative remedy of various wavier provisions. The appellants refuse to follow this administrative avenue for the same reasons. In deciding whether to grant a waiver on each of the various rules objected to, the agency would be determining the truth or falsity of appellants' religious convictions.

This Court has long held every person has the right to entertain religious notions, regardless of how novel they are. *Davis v. Benson*, 133 U. S. 333 (1890). The fact the physical care of children is "usually secular", as the Kansas Supreme Court notes, does not give that Court, or any state agency, the privilege of concluding that such is the rule when confronted with the appellants' religious convictions.

The recent opinion of this Court in *Committee for Public Education v. Regan*, 100 S. Ct. 840 (1980), points to the substantiality of questions presented under the Establishment Clause. Justice White, speaking for the Court, stated (p. 851):

> "But Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this

promises to be the case until the continuing interaction between the Courts and the States - the former charged with interpreting and upholding the Constitution and the latter seeking to provide education for their youth - produces a single, more encompassing construction of the Establishment Clause".

2. The question of whether a religious home for children must comply with state license application procedures is of special significance because of the peculiar statutory scheme in Kansas. Appellants do not object to a licensing procedure per se, but instead object to Kansas procedure which entails investigation and regulation by the Social and Rehabilitation Service and the State Department of Education. Action by these state agencies is not concerned with the physical surroundings of Victory Village, but instead creeps into the religious mission undertaken there.

In *Sherbert v. Verner,* 374 U. S. 398 (1963), the Court explained the conditions to be satisfied by the State if its legislation is to withstand attack when it interferes with the religious freedoms guaranteed by the United States Constitution. State action may be constitutionally justified when either of two tests are met: one, if there is no infringement by the State on the free exercise of one's beliefs; or two, if the burden on the protected freedom may be justified by a "compelling state interest".

In the instant case it is settled beyond doubt that any investigation or regulation by state agencies, on matters other than those concerned with the physical surroundings, infringe on the free exercise of appellants' religious beliefs.

As part of the second test, the State must demonstrate there are no alternative forms of regulations which would advance the interests asserted by the State to justify the constitutional infringement on appellants' rights. *Sherbert*

v. Verner, supra, 374 U. S. at 407. See also *Wisconsin v. Yoder,* 406 U. S. 205, 233 (1972); *Braunfeld v. Brown,* 366 U. S. 599, 607 (1961).

The Kansas Supreme Court upheld the validity of the licensing application scheme without considering lesser restrictive alternatives, except in a most conclusory manner. Appellants contend that protection of children can be achieved through application procedures assuring minimum standards of health and safety without interfering with any religious practices and without concerning itself with any educational requirements for staff or children. *State v. Fayetteville Street Christian School,* 42 N.C. App. 665, 258 S.E. 2d 459 (N.C. 1979). Vacated and remanded on procedural grounds, 261 S.E. 2d 908 (N.C. 1980).

When the interest of the State, along with available lesser restrictive alternatives are considered it is clear the State failed to demonstrate any compelling state interest required under the Free Exercise Clause.

In order to withstand an attack urging the unconstitutionality of state legislation and regulations under the Establishment Clause, the State must satisfy all three parts of a well-established test:

FIRST, the statute must have a secular legislative purpose. See, e.g., *Epperson v. Arkansas,* 393 U. S. 97 (1968).

SECOND, it must have a primary effect that neither advances nor inhibits religions. See, e.g., *Abington School District v. Schempp,* 374 U. S. 203 (1963).

THIRD, the statute, regulations, and the administration thereof must avoid excessive government entanglement with religion. See, e.g., *Walz v. Tax Commission,* 397 U. S. 664 (1970).

This Court has approved this three-part test in *Meek v. Pittenger*, 421 U. S. 349 (1975); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U. S. 756 (1973); *Lemon v. Kurtzman*, 403 U. S. 602 (1971).

Appellants concede there is no violation of the first part of the Establishment test. As to the second part of the test, the State can prosecute the appellants for the ministry of their religious beliefs of which full-time, twenty-four hour care of children is an integral part. On the other hand, religions which operate day care centers and minister to children on a part-time, non-live-in basis, are not regulated under the instant legislation. This amounts to an officially sanctioned religion.

The legislation also fails the third test as applied to appellants: there is excessive entanglement of the State with appellants' religion.

In determining whether government entanglement with religion is excessive, the character and purpose of the institutions benefited or inhibited, the nature of aid or hinderance the State provides, and the resulting relationship between the government and the religious authority must be examined. See *Lemon v. Kurtzman*, 403 U. S. 602, 615 (1971).

A Federal Court dealing with a totally fundamentalist religious environment noted:

> "The risk of unseemly governmental entanglement increases exponentially as the function of an institution becomes more fundamentally and pervasively religious". [*Equal Employment Opportunity Commission v. Southwestern Baptist*, supra, p. 260].

As in that case, appellants seek to preserve and transmit Biblical teachings in a pure and fundamental form.

A summary of the application procedure demonstrates the excessive entanglement which violates the Constitution. No license may be granted without the approval of the Secretary of the Social and Rehabilitation Services, allowing inspection and intermeddling in appellants' affairs. In the Secretary's discretion, unlimited inspections may be had and to facilitate this, the statute grants State agents "the right of entry and access to the premises of said home and to *any information deemed necessary to the completion of said investigation*". K.S.A. (1976 Supp.) 65-504 [emphasis supplied]. This is in effect *carte blanche* to the State to demand anything which in their discretion, without standards to limit their discretion, they deem necessary.

The Kansas Supreme Court failed to follow established precedent of this Court by neglecting to apply the three-part test to determine the validity of the licensing application procedures upon Establishment Clause objections.

The appellants also contend the license fee required in order to conduct their home, which provides Christian guidance to young children in need, is a tax laid on the exercise of their religious freedom. *Follett v. McCormick*, 321 U. S. 573 (1943); *Murdock v. Pennsylvania*, 319 U. S. 105 (1943).

The questions presented upon this appeal have been considered by lower courts and a decision in this area would be of great importance. See, e.g., *Cherris v. Almundson*, 460 F. Supp. 326 (E. D. La. 1978) [plethora of information required in order to obtain religious solicitation license and unbridled discretion vested in officials evaluating license applications created unconstitutional burden on Free Exercise Rights]; *Equal Employment Opportunity Commission v. Southwestern Baptist*, supra [employment relationship between seminary and support personnel was such that E.E.O.C. jurisdiction would infringe on Free Ex-

ercise Rights]; *State v. Fayetteville Street Christian School*, supra [upheld upon the Free Exercise challenge a licensing act which did not grant the State any authority to interfere with religious belief of church-operated day-care centers, but spoke only to minimum standards of health and safety]; *State v. Whisner*, 47 Ohio St. 2d 181, 351 N.E. 2d 750 (1976) [where State Board of Education's minimum standards were so comprehensive so as to eradicate the distinction between public and nonpublic education, application to parents of religious school children violated Constitution]; *Oxford v. Hill*, 558 S.W. 2d 557 (Civ. App. Tex. 1977) [held constitutional the Texas Child Care Licensing Act which stated the freedom of religion of all citizens must be inviolate].

CONCLUSION

The questions presented by this appeal are substantial and of public importance. The decision below conflicts with decisions of this Court. It cannot be sustained on the grounds advanced by the court below. If allowed to stand, it invites courts, judges and State Officials to determine what is religious, and what is secular, even when faced with truly held and consistently practiced religious beliefs.

We submit that this Court has long held otherwise. Probable jurisdiction should be noted, and the case set for argument on the merits.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 50,077

STATE OF KANSAS, EX REL., JOSEPH P. O'SULLIVAN, COUNTY ATTORNEY, RENO COUNTY, KANSAS,
Appellee,

v.

HEART MINISTRIES, INC.; VICTORY VILLAGE HOME FOR GIRLS; WILLIAM COWELL AND CAROL COWELL, AS DIRECTORS AND OPERATORS OF VICTORY VILLAGE HOME FOR GIRLS, AND AS INDIVIDUALS,
Appellants.

SYLLABUS BY THE COURT

1.

The State, as *parens patriae,* has a legitimate, vital interest in private establishments which provide residential care for children, and that interest is sufficient to warrant licensing, together with reasonable inspection and regulation.

2.

The free exercise clause of the First Amendment to the Constitution of the United States permits reasonable regulation of otherwise protected religious activity when imposed pursuant to a compelling State interest.

3.

While religious beliefs cannot be regulated, some overt acts, though in the exercise of one's religious convictions, are not totally free from legislative restriction.

4.

A valid and compelling State interest, such as its interest in the protection of children, is subject to a balancing process when State action impinges on individual free exercise rights.

5.

A compelling interest of the State, as *parens patriae,* is the protection of its children from hunger, cold, cruelty, neglect, degradation, and inhumanity in all its forms.

6.

The State may require, as a prerequisite to the operation of a children's home, the inspection of the premises, the payment of a nominal fee, and the securing of a license.

7.

Where an administrative remedy is provided by statute, such remedy ordinarily must be exhausted before a litigant may resort to the courts.

8.

In an appeal from the granting of an injunction prohibiting the defendants from operating a children's home or related facility, or from performing various services concerning children, the record is examined and it is *held* that the trial court did not err.

Appeal from Reno district court, RICHARD J. ROME, associate judge. Opinion filed March 1, 1980. Affirmed.

Lester C. Arvin, of Arvin, Arvin & Busey, Chartered, of Wichita, argued the cause, and *Rodney H. Busey* and *Mark A. Buck,* of the same firm, were with him on the brief for the appellants.

Joseph P. O'Sullivan, county attorney, argued the cause, and *Robert T. Stephan,* attorney general, *Bradley J. Smoot,* deputy attorney general, and *Reid Stacey,* assistant attorney general, were with him on the brief for the appellee.

The opinion of the court was delivered by

MILLER, J.: Heart Ministries, Inc. and William and Carol Cowell appeal from the issuance of a permanent injunction against them by the trial court. The propriety of that order is attacked on numerous grounds, one of which we believe to be determinative: whether the licensing requirement of K.S.A. 1979 Supp. 65-501 and the fee requirements of K.S.A. 1979 Supp. 65-505 violate appellants' rights under the "free exercise" clause of the First Amendment to the Constitution of the United States.

The State, through the county attorney of Reno County, brought this action in June, 1977, praying for an injunction prohibiting the defendants, Heart Ministries and the Reverend and Mrs. Cowell, from operating, maintaining, or holding themselves out to the public as operating or maintaining a maternity hospital, a home, a boarding home, or a placement agency for juveniles under the age of 16, until defendants obtain a state license for such operations. The petition also sought an injunction prohibiting defendants from bringing children under the age of 18 into Kansas for placement in foster care in this state until defendants comply with the Interstate Compact on the Placement of Children, K.S.A. 1979 Supp. 38-1202.

Victory Village Home for Girls was originally designated as a defendant. The trial court found that Victory Village Home for Girls is not a separate legal entity, but merely a name used by Heart Ministries. Victory Village Home for Girls was thereupon stricken as a party defendant from this lawsuit. No appeal is taken from that order.

We now turn to the relevant facts. Reverend Cowell, a native Kansan, graduated from Kansas State University in 1961 with a degree in agronomy. Thereafter he attended Wheaton School of Theology in Chicago, graduating

with the degree of Bachelor of Divinity in 1965. Mrs. Cowell attended both Moody Bible College and Wheaton, but did not complete her work for a degree.

In 1965, the couple returned to Kansas. Reverend Cowell first had a pastorate in Hoisington, then in 1968 he accepted the call to a church in Marion. It was there that he and Mrs. Cowell became interested in helping children. In 1971, Heart Ministries was incorporated as a non-profit corporation. The nature of its business is set forth in its articles of incorporation:

> " '[T]o provide housing, facilities, care and detention for wayward, homeless or delinquent individuals . . . to preach the Word of God, lead individuals to trust Christ as Savior and Lord, reach out with His love and compassion to those whose lives have been broken and marred by sin, and thus rescue the perishing. As the Lord leads, homes shall be established and scriptural methods shall be used as necessary in order to accomplish this purpose.' "

Reverend Cowell became interested in establishing a home for unwed mothers at Marion. Application was made for a state license, but the proposed facility did not conform to standards relative to financing, social services, and fire safety. Extensive and expensive modification to the structure would have been required. After much correspondence, several conferences, and inspection by various state and local officials, plans for the Marion County facility were abandoned. The Marion County land was sold, since licensing did not appear feasible.

Heart Ministries then purchased a tract of 117 acres located about 7 miles east of Hutchinson, in Reno County, in November, 1972. This tract is known as Victory Village. Reverend and Mrs. Cowell moved there, and at first occupied a trailer house; later a parsonage was built, and

a large multipurpose metal building, housing a chapel, church offices, a radio studio, and a school, was completed. Construction of a two-story masonry structure, designed as a dormitory for girls and containing between eight and nine thousand square feet, was commenced in the summer of 1973. There were numerous contacts with state authorities as to construction, sanitation, area per resident, and the like, and it appears that the building is being erected in compliance with state standards and regulations. Construction was not complete at the time of trial in November, 1977.

During the period from 1972 to 1977, the defendants operated the Victory Village Home for Girls, and mention of that function or ministry was made by Reverend Cowell on his radio ministry, a program carried by six stations in a number of states. Twenty-one girls were placed in the home at various times by their parents or guardians; they came from Arizona, Arkansas, Colorado, Kansas, Missouri, Oklahoma, and Texas; the girls stayed an average of from nine months to a year. Housing was provided in private homes, some being trailers in the Village and others being homes nearby. Some of the girls stayed with Reverend and Mrs. Cowell; four girls were staying with them shortly before this action was filed. Some of the trailer homes were licensed as foster homes by the owners, but the Cowell home was never licensed. About 1972, Reverend Cowell applied for a "foster home" license so that he could care for four or fewer girls in his own home; he withdrew that application before it was acted upon. No other application for any type of girls' home was made by the defendants, nor was application made by them to operate a placement agency.

The ministry for girls as carried on by the defendants includes caring for them and providing food and shelter, schooling, counseling, and religious training. A school is

operated at the Village. It uses the Accelerated Christian Education System and is not state accredited, although an expert testified that the system fulfills state requirements. Thirteen girls, in grades one through eight, were attending the school at the time of trial.

In June, 1977, four girls who were living in the Cowell's home and attending defendants' school were taken into custody by juvenile authorities on the complaint of an out-of-state acquaintance of one of the girls. Two of the girls were 14 years of age, two 16; two lived in Kansas, one in Nebraska and one in Oklahoma. All were returned to their parents. This action was filed shortly thereafter.

We turn now to the applicable statutes and regulations. The Interstate Compact on the Placement of Children was adopted by the Kansas Legislature in 1976. It appears as K.S.A. 1979 Supp. 38-1202 *et seq.*, and provides in substance that no "sending agency," which designation includes private persons, may send, bring, or cause to be sent or brought, any child into this state for placement in foster care without the consent of the appropriate public authorities in this state.

K.S.A. 1979 Supp. 65-501 declares it to be unlawful "for any person, firm, corporation or association to conduct or maintain a maternity hospital or home, or a boarding, receiving or detention home for children under sixteen (16) years of age without having a license therefor from the secretary of health and environment."

K.S.A. 65-502 defines maternity hospital or home.

K.S.A. 1979 Supp. 65-503 defines a boarding home for children in part as a house or other place conducted or maintained by anyone who (1) "advertises or holds himself or herself out as conducting a boarding house

or home for children under sixteen (16) years of age"; or (2) "has in his or her control or custody one or more children under sixteen (16) years of age unattended by parent or guardian for the purpose of providing such children with food or lodging, or both, except children related to him or her by blood or marriage, or legal adoption."

K.S.A. 1979 Supp. 65-504 provides for the issuance of annual licenses for a specified number of residents by the secretary. Both an inspection of the facility by the secretary of health and environment, and the approval of the secretary of social and rehabilitation services, are required before the license may issue. Provisions are included for temporary licensing. Whenever a license is denied or revoked, the secretary of health and environment, the issuing authority, must issue an order stating the reasons for such action. Provision is made for the appeal to the district court of either denial or revocation of a license.

K.S.A. 1979 Supp. 65-505 fixes license fees at $2 for homes having 4 or fewer residents, and at $5 for homes having 5 or more residents.

K.S.A. 1979 Supp. 65-506 prohibits the placing of children under the age of 16 years in any unlicensed maternity home or home for children.

K.S.A. 1979 Supp. 65-507 requires maternity homes and homes for children to keep records of each child received and cared for therein.

K.S.A. 1979 Supp. 65-508 sets forth certain requirements for the physical facilities, and it authorizes the secretary of health and environment, with the cooperation of the secretary of social and rehabilitation services, to develop and adopt rules and regulations for the operation and maintenance of maternity homes and homes for children, designed to promote the health, safety and welfare

of the residents. K.S.A. 1979 Supp. 65-512 requires the secretary of health and environment to inspect each facility at least once every six months.

The regulations, as would be expected, are lengthy and quite detailed, and we will make no attempt to summarize all of them here. The various categories of care centers for children are differentiated in the regulations by size: *residential centers* are those which provide 24-hour a day care for more than 10 children; *group boarding homes,* for not less than 5 nor more than 10 children; and *foster homes,* for four or fewer children. K.A.R. 28-4-75, 28-4-250, 28-4-300. The regulations for residential centers and for group boarding homes are almost identical; the regulations for foster homes are much less detailed and less restrictive. Thirteen children were under the care of Heart Ministries at the time this case arose. The dormitory under construction would obviously house and accommodate more than four children. Further, the regulations targeted in the presentation of defendants' case were those relating to the larger categories. Therefore we are concerned only with the regulations pertaining to residential centers or group boarding homes.

The regulations on licensing procedures require the submission of a written proposal detailing the purpose of the center, the administration, financing, staffing, and services to be offered, and must include plans for all buildings to be used. The administration section requires that the applicant or its parent body be a nonprofit corporation. The governing board must have at least six members representing a variety of community interests. Finances must be sound and adequate; an annual financial statement must be submitted to the secretary of social and rehabilitation services; and the financial records must be audited annually by a public accountant. Children may not be used in soliciting funds. Liability and casualty

insurance is required. Personnel policies must be adopted and records maintained. Training must be provided for staff; minimum qualifications for staff are set forth; health certificates are required; sex offenders or those convicted of felony involving intentional bodily harm may not be employed. Medical and other consultant services must be provided. Records must be kept on each resident and each employee. Discipline which is humiliating, frightening, or physically harmful shall not be used. Corporal punishment, defined as any method of punishment which inflicts pain, is prohibited. Health care, mental health, nutrition, and accident prevention policies are spelled out. Environmental standards cover the physical facilities, construction, location, lighting, heating, food service, water supply, sewage, laundry, and swimming pool safety.

A child placement agency is defined in K.A.R. 28-4-160 as a child or family welfare agency which receives children for services which may lead to placement in institutions or in foster family homes for boarding care, free care, or adoption. Various regulations governing such an agency follow. Licensing is required.

The activities of the defendants challenged by the State include acting as a child placement agency without a license; acting as a residential center, group boarding home, or foster home, or any of them, without an appropriate State license; and bringing children into Kansas for placement in violation of the Interstate Compact. Defendants, by interrogatories submitted before trial, admitted that they hold no such licenses, and that they have provided board and room for many girls under the age of 16 who were not related to the Cowells. They concluded their answers by stating:

> "Defendants do not intend to apply for any license to operate a foster home or a boarding home

> for children or to abide by any rules or regulations adopted by the Kansas Department of Health and Environment, and the Department of Social and Rehabilitative Services which would make them disobedient to God's command. The defendants will meet any reasonable regulation that is not against their religious convictions."

During trial, Reverend Cowell testified that he had no religious objection to reasonable regulations pertaining to health and safety, but he objects on religious grounds to many of the regulations. He believes that corporal punishment is required by scripture; this includes beating children with belts and boards. He objects to the requirement that sound and sufficient finances be disclosed, that an annual financial statement be prepared, and that the accounts be audited, believing that God will provide. He interprets the regulations to require a budget and pledges, which is not consistent with his faith. The requirement of the keeping of records of each child and the disclosure of those records to the State, would be a breach of ethics of his Christian ministry. He objects to the requirement that medical and other professional consultants be arranged for in advance, believing that as the need arises someone can be found to meet that particular need. Finally, he reads the regulations as prohibiting the defendants from attempting to convert to the Christian faith all residents in the Village, a duty which is Biblically imposed upon all Christians.

Reverend Cowell testified that he believes that "everything we do twenty-four hours a day, seven days a week, in the parsonage, in the church, on the grounds, and Victory Village or wherever we go from there, is covered by convictional commandment from God's Word, the Bible." Victory Village Home for Girls is one aspect of the total ministry. Other aspects include the church, the school for

the girls, counseling the girls as well as others, evangelism, and the radio ministry.

The trial court carefully reviewed the evidence, read the dozens of Biblical and legal citations submitted, and entered its order by way of a lengthy and comprehensive memorandum of decision filed April 21, 1978. The court found that the religious convictions of the Reverend Cowell and those participating in the work of Heart Ministries, Inc. were legitimate, truly held, and consistently practiced, in spite of the fact that any conflict between those beliefs and the state regulations was not asserted by the defendants until after this action was filed. The court found that the State has a genuine interest in the care, treatment and protection of children; and that what is involved is a balancing of the interest of the defendants in the free exercise of their religion against the governmental interest of the State in the welfare of the children. The court said:

> "[T]he Court notes that only since the filing of the Petition herein have the Defendants complained of their resistance to obtaining a license on religious grounds. The Court notes that since 1971 the Defendants have been involved, on different occasions, in the housing of pregnant girls; the placing of the offspring up for adoption; the housing of children under sixteen years of age, both from Kansas and from without; the beating of children; the restriction of childrens' mail, communication, mode of dress, freedom of religion, and even limiting their education; the placing of children from outside the State of Kansas to foster homes in this State; using children to raise funds for its ministry.
>
> "In all of these incidents mentioned in the last paragraph, the State has a legitimate interest. The requiring of a license for persons who are to operate

> a foster home, a boarding home, or a residential center for children under sixteen is, in this Court's opinion, a legitimate exercise of the police power of the State. It is a *compelling* State interest, and one which is reasonable. The State has a right to determine the purpose of such homes; their administration; their financing, services, and staffing; the safety of children is of paramount interest to the State."

The court then concluded that the statutes and regulations were constitutional and valid, and the court permanently enjoined the defendants from "operating, maintaining, or holding themselves out to the public as operating or maintaining a maternity hospital, or home, or boarding home as defined by K.S.A. 65-202 and K.S.A. 65-503; or from acting as a placement agency for juveniles under the age of sixteen (16) . . . [or from] bringing into or receiving within the State of Kansas children under the age of eighteen (18) for placement in foster homes or foster care within this State . . . until further order of the Court."

The first question before us is whether the State has an interest in the children's care, when provided by other than parents, sufficient to warrant control by way of license, inspection, and regulations. In the case of *In re Turner,* 94 Kan. 115, 145 Pac. 871 (1915), we considered the juvenile court act passed in 1905, L. 1905, ch. 190, later codified as G.S. 1909, 5099-5113. We said:

> "[The Act] is an assertion upon the part of the state of its right to exercise its power of *parens patriae* for the welfare of such of its minor citizens as are deprived of proper parental control and oversight . . . . These words, meaning 'Father of his country,' were applied originally to the king and are used to designate the state, referring to its sovereign power of guardianship over persons under disability." (p. 120.)

We quoted Mr. Justice Taney's concurring opinion in *Fountain v. Ravenel,* 58 U. S. 369, 393, 15 L. Ed. 80 (1854), recognizing that these powers, which belong to the sovereign as *parens patriae,* are not conferred upon United States Courts, but remain with the State. We also cited *Wisconsin Industrial School for Girls v. Clark County,* 103 Wis. 651, 79 N.W. 422 (1899), and we quoted the following passage from that opinion:

> " 'Every statute which is designed to give protection, care, and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails. No constitutional right is violated, but one of the most important duties which organized society owes its helpless members is performed just in the measure that the law is framed with wisdom and is carefully administered.' (p. 665.)" (94 Kan. at 121.)

In re Turner is followed in our later cases. *In re McCoy,* 184 Kan. 1, 9, 334 P. 2d 820 (1959); *Lennon v. State,* 193 Kan. 685, 691, 396 P. 2d 290 (1964); *In re Johnson,* 214 Kan. 780, 522 P. 2d 330 (1974); and see *In re Kerns,* 225 Kan. 746, 751, 594 P. 2d 187 (1979). In *Lennon,* speaking of the purposes underlying the juvenile code, K.S.A. 38-801 *et seq.,* we said:

> "The statute is but a legislative expression of the concern which the people of this state have always had for the welfare of children. This court early gave voice to the public feeling in this regard. Speaking for the court in the case of *In re Bullen,* 28 Kan. 781, Justice Brewer posed the paramount question:
>
> " '. . . What will be best for the welfare of the child? . . .' (p. 786.)

"Like a vivid, vital strand, this concept of what is best for the child runs through the tapestry woven from our many decisions dealing with child custody, care and placement." (193 Kan. at 689-690.)

The statutes and regulations to which the defendants object are all designed to protect, in one way or another, the children who are cared for in homes other than those provided by their parents. The licensing and inspection, as well as the myriad regulations, are concerned with the care and well being of the children—their shelter, health, diet, safety, education, and general welfare are of prime concern.

The parents of the children in the defendants' facilities are absent and cannot look after them. The children are dependent upon the operators and employees of the home in which they reside for food, care, and shelter. Their welfare is a matter of State concern. Historically the State has protected children from injury and injustice, from harmful employment and environment, and from abuse in all forms. Under the doctrine of *parens patriae*, the State has power to legislate for the protection of minor children within its jurisdiction. The rule is stated in 43 C.J.S., Infants §5, as follows:

"The state has an interest in protecting the welfare of infants, within its borders; and the state, as parens patriae, has the duty to see that every child within its borders receives proper care and treatment. The power of the state to control the activities and conduct of children reaches beyond the scope of its authority over adults.

"The power of state, as parens patriae, is not an unlimited and arbitrary one, and is exercised only in cases where the child is destitute of that parental care and protection to which he is entitled. To effect

> such power the legislature may and should make reasonable regulations tending toward the protection and welfare of the child; and so important is this governmental function that the limitations of the constitution are to be so construed, if possible, as not to interfere with its legitimate exercise. Such legislation is beneficial and remedial, not criminal in its nature, and entitled to favorable and liberal construction." (pp. 67-68.)

See also 67A C.J.S., Parent and Child §15 and 42 Am. Jur. 2d, Infants §§ 14, 15.

Nursing, convalescent, and rest homes, which furnish shelter, food, and care for the sick, aged, or infirm, are all subject to licensing and regulatory acts. This is widely recognized. See Annot., 97 A.L.R. 2d 1187. Surely a children's home is as affected with the public interest as any of those. We hold that the State has a legitimate, vital interest in private establishments which provide residential care for children, and that interest is sufficient to warrant licensing, together with reasonable inspection and regulation.

The next issue is whether K.S.A. 65-501 *et seq.*, requiring the obtaining of a license and the payment of a fee in order to operate a children's home, as applied to the defendants, violate their rights to the free exercise of religion guaranteed by the First and Fourteenth Amendments of the United States Constitution. The trial court found that the beliefs of the defendants are "truly held," and that "requiring the Defendants to comply with the rules and regulations . . . [applicable] to boarding homes, maternity homes, and placement agencies, would cause them to depart from their religious convictions." The State did not cross-appeal; therefore, findings adverse to the State are nonreviewable. *Vaughn v. Murray,* 214 Kan.

456, 521 P. 2d 262 (1974). These nonreviewable findings establish that the defendants' conduct is religiously grounded; as such it is under the protection of the free exercise clause of the First Amendment. *Wisconsin v. Yoder,* 406 U.S. 205, 219-220, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972).

Appellants rely upon the trial court's finding that the activities and ministries of the defendants, including the operation of the home, are religious in nature and constitute the exercise of religion. They then challenge the licensing and the requirements as "prior restraints" on the exercise of a constitutionally protected right, the free exercise of their religion as exemplified by their ministry to children in the operation of the home. They cite as controlling *Cantwell v. Connecticut,* 310 U.S. 296, 84 L. Ed. 1213, 60 S. Ct. 900 (1940) and *Kunz v. New York,* 340 U.S. 290, 95 L. Ed. 280, 71 S. Ct. 312 (1951).

Cantwell held violative of First Amendment rights a Connecticut statute which made it an offense to solicit funds for religious purposes without a license. The offensive part of the statute, however, was not the mere requirement of a license or permit. What the court found in contravention of the First Amendment was the licensing procedure, which required the secretary of the public welfare council, upon each application for license, to determine whether the cause was a religious one. The court said:

> "Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent. The State is likewise free to regulate the time and manner of solicitation generally, in the

> interest of public safety, peace, comfort or convenience. But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution." 310 U.S. at 306-307.

Kunz was concerned with a New York City ordinance which made it unlawful to hold public worship meetings on the streets without first obtaining a permit. There was no mention in the ordinance of reasons for which a permit might be refused, and thus the police commissioner, as the licensing official, could exercise unbridled discretion in denying applications. The court said:

> "We have here, then, an ordinance which gives an administrative official discretionary power to control in advance the right of citizens to speak on religious matters on the streets of New York. As such, the ordinance is clearly invalid as a prior restraint on the exercise of First Amendment rights. . . .
>
> "[W]e have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places. . . .
>
> ". . . New York cannot vest restraining control over the right to speak on religious subjects in an administrative official where there are no appropriate standards to guide his action." 340 U.S. at 293-295.

In support of their argument that the modest fee fixed by statute for an annual license constitutes a per se violation of the free exercise clause, appellants rely upon *Murdock v. Pennsylvania*, 319 U.S. 105, 87 L. Ed. 1292, 63 S. Ct. 870 (1973). In *Murdock*, the court struck down a

licensing ordinance of the City of Jeannette, Pennsylvania, which, as applied, required Jehovah's Witnesses to pay substantial fees and obtain a city license before going from door-to-door distributing literature, spreading their faith, and soliciting people to purchase their religious books and pamphlets. The court said:

> "The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down. . . . [W]e have something very different from a registration system under which those going from house to house are required to give their names, addresses and other marks of identification to the authorities. . . . [T]he issuance of the permit or license is dependent on the payment of a license tax. And the license tax is fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues. It is not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question. It is in no way apportioned. It is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment. Accordingly, it restrains in advance those constitutional liberties of press and religion and inevitably tends to suppress their exercise." 319 U.S. 113-114.

These cases are primarily concerned with the dissemination of ideas, the free speech as well as the free exercise aspects of the First Amendment. They stand for the proposition that inordinate restraints upon the dissemination of religious ideas will not be tolerated. They do not deal primarily with activities secular in nature. Even so, implicit in each opinion is the recognition that some lesser measure of restraint, when necessary for the public good, may be appropriate as to the secular aspects of the activity.

Appellant is equating the operation of homes for children, usually a secular activity, with the dissemination of religious ideas. The teaching of religious doctrine to children simply cannot be equated with every aspect of the physical care of children on an around-the-clock basis for First Amendment purposes. The free exercise clause permits reasonable regulation of otherwise protected religious activity when imposed pursuant to a compelling State interest. *Wisconsin v. Yoder,* 406 U.S. at 215, held that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." Thus when there is a valid State interest, such as its interest in universal education, it is subject to a balancing process when it impinges on free exercise rights.

While religious beliefs cannot be regulated, some overt acts, though in the exercise of one's religious convictions, are not totally free from legislative restriction. In *Sherbert v. Verner,* 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963), the court said:

> "The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such, *Cantwell v. Connecticut,* 310 U.S. 296, 303. Government may neither compel affirmation of a repugnant belief, *Torcaso v. Watkins,* 367 U.S. 488; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, *Fowler v. Rhode Island,* 345 U.S. 67; nor employ the taxing power to inhibit the dissemination of particular religious views, *Murdock v. Pennsylvania,* 319 U.S. 105; *Follett v. McCormick,* 321 U.S. 573; cf. *Grosjean v. American Press Co.,* 297 U.S. 233. On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts

> prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.' *Braunfeld v. Brown,* 366 U.S. 599, 603. The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." (pp. 402-403.)

Governmental interest in conscription laws was held in *Gillette v. United States,* 401 U.S. 437, 28 L. Ed. 2d 168, 91 S. Ct. 828, *reh. denied,* 402 U.S. 934 (1971), to be of a kind and weight sufficient to justify the impact of the conscription laws on those who object to particular wars on religious bases.

We have previously discussed the interest and the duty of the State as *parens patriae* in the care of minor children. Some regulation of establishments proposing to provide such care is absolutely necessary; even appellants make no objection to the State's fire and safety regulations.

But appellants adamantly and unequivocally refuse to apply for any State license, or to pay the required fee. Absent the existence of licensing procedure, applicable to sectarian and nonsectarian establishements alike, the State lacks essential knowledge required for the exercise of its power and duty to protect children from physical and mental harm. Absent licensing, the fire and safety regulations, with which defendants are willing to comply, could not be effectively enforced and their purpose would be compromised.

The fee is minimal; it does not have the repressive force of the charges imposed by the ordinance attacked in *Murdock*—$5.00 per *year* for a license to operate a residential center for ten or more children, as compared with the *Murdock* fee of $1.50 per day, or over $400 per year

when paid on a weekly basis, for the sale of religious literature door-to-door by one person. The five-dollar fee does not purport to meet the actual cost of licensing, let alone inspection and consultation. It is not exclusively a revenue-raising measure, but "a nominal fee imposed as a regulatory measure to defray [at least in small part] the expenses of policing the activities in question." See *Murdock,* 319 U.S. at 113-114.

The compelling interest of the State, as *parens patriae,* is the protection of its children from hunger, cold, cruelty, neglect, degradation, and inhumanity in all its forms. To fulfill this responsibility, the legislature has elected to impose licensing and inspection requirements. To these requirements the defendants' free exercise rights must bow; the balance weighs heavily in favor of those unfortunate children whom the State must protect.

The defendants have no license, and they have not sought one. They state that they do not intend to apply for a license, or to abide by any regulations which they find objectionable on religious grounds. Since we hold that licensing is necessary and the fee reasonable, and defendants have no intention of becoming licensed, the reasonableness of each and every regulation as balanced against defendants' religious objections need not be determined.

One further matter deserves attention. Appellants have wholly failed to avail themselves of the administrative remedies open to them by way of the various waiver provisions encompassed within the pertinent administrative regulations. See, for example, K.A.R. 28-4-266 (4). It is a familiar doctrine that administrative remedies should be exhausted before resort is made to the courts. See *State ex rel. v. Unified School District,* 218 Kan. 47, 542 P. 2d 664 (1975); *Jarvis v. Kansas Commission on Civil*

Rights, 215 Kan. 902, 528 P. 2d 1232 (1974); *Jenkins v. Newman Memorial County Hospital,* 212 Kan. 92, 510 P. 2d 132 (1973); *Holmstrom v. Sullivan,* 192 Kan. 746, 391 P. 2d 100 (1964). The rule, followed in the great majority of American courts, is stated in 73 C. J. S., Public Administrative Bodies and Procedure §41:

> "Where an administrative remedy is provided by statute, such remedy ordinarily must be exhausted before a litigant may resort to the courts."

The appellants have not applied for a license; they have no license. As we have held above, a license is a prerequisite to the operation of the various child care facilities and services defendants were operating or performing. The trial court's grant of injunctive relief was proper.

The judgment is affirmed.

FROMME, J., not participating.

SUPREME COURT,)
) ss.
STATE OF KANSAS,)

Dist. Court No. 77 C 142
No. 50077

(Filed April 22, 1980)

The State of Kansas, to the District Court within and for the County of Reno in the State of Kansas, Greeting:

WHEREAS, In a certain civil, action lately pending before you, wherein The State of Kansas, ex rel were plaintiffs and Heart Ministries, Inc., et al were defendants a judgment was rendered by you against the said Defendants from which judgment said Defendants prosecuted an appeal in the Supreme Court within and for the State of Kansas;

AND WHEREAS, at the October Session of the July Term of said Supreme Court, A. D. 1979, on consideration of the said appeal ..... it was ordered and adjudged by the said Supreme Court that the judgment of the District Court be Affirmed, a certified copy attached hereto, and that the said ..... recover against the said ..... Dollars for ..... costs herein expended and have execution therefor.

YOU ARE THEREFORE COMMANDED, That without delay you cause execution to be had of the said judgment of the Supreme Court, according to law.

Costs		
Fees of Clerk of Supreme Court	$ 35.00	Paid
Record	.....	
Transcript	.....	
Other costs	.....	
Total	$	

WITNESS my hand and the seal of said Supreme Court affixed hereto, at my office, in the City of Topeka, on the 21 day of April A. D. 1980.

/s/ Lewis C. Carter
Lewis C. Carter
Clerk of the Supreme Court

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 50,077

THE STATE OF KANSAS, ex rel Joseph P. O'Sullivan,
County Attorney, Reno County, Kansas
Appellee

v.

HEART MINISTRIES, INC.; VICTORY VILLAGE HOME FOR GIRLS; WILLIAM COWELL and CAROL COWELL, as Directors and Operators of Victory Village Home for Girls, and as individuals
Appellants

You are hereby notified of the following action taken in the above entitled case:

Motion for Rehearing.

DENIED.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date April 9, 1980

APPENDIX B

IN THE DISTRICT COURT OF RENO COUNTY, KANSAS

NO. 77-C-142

THE STATE OF KANSAS, ex rel Joseph P. O'Sullivan, County Attorney, Reno County, Kansas,

vs.

HEART MINISTRIES, INC,; Victory Village Home for Girls; William Cowell and Carol Cowell, as Directors and Operators of Victory Village Home for Girls, and as individuals,
Defendants.

MEMORANDUM DECISION

(Filed April 21, 1978)

NOW, on this 18th day of November, 1977, the above matter comes on for trial to the Court. The State is present and is represented by Joseph P. O'Sullivan, III. Also appearing for the State is Timothy O'Sullivan, attorney for the State Department of Social and Rehabilitation Services. The Defendants are present in person and are being represented by Lester C. Arvin and Rodney H. Busey, Attorneys at Law. Extensive arguments are made. Legal Briefs are offered to the Court. The matter is finally submitted, and taken under advisement by the Court.

On June 22, 1977, the State of Kansas, hereinafter called the Plaintiff, through the County Attorney of Reno County, Kansas, filed a Petition in this Court praying for a permanent injunction against the Defendants restraining them from operating, maintaining, or holding themselves out to the public as operating or maintaining a maternity

hospital or home, a boarding home, or a placement agency for juveniles under the age of sixteen (16), until said Defendants obtain a valid license issued by the State Department of Health and Environment pursuant to K.S.A. 65-501, et seq.

The Plaintiff further requested the Court to permanently enjoin the Defendants from bringing into, or receiving within, the State of Kansas, children under the age of eighteen (18) for placement in foster care homes in this State, until said Defendants have complied with each and every requirement set out in K.S.A. 38-1201, et seq., known as the Interstate Compact On The Placement of Children.

Along with the requests for permanent injunctive relief, the Plaintiff also applied for a restraining order and a temporary injunction against the Defendants pending final disposition of the matters.

An ex parte restraining order was granted to the Plaintiff by the Court on June 22, 1977. Defendants filed a Motion to Dissolve and Vacate Restraining Order on June 27, 1977. That Motion and the hearing for a temporary injunction was heard by the Court on July 11, 1977. Prior to said hearing, on July 8, 1977, the Defendants filed an Answer setting forth ten (10) specific defenses as well as a general denial to the Plaintiff's Petition. In addition thereto, the Defendants again prayed for the vacation of the restraining order and a denial of a temporary injunction.

It should be noted here that the restraining order prohibited Defendants from operating, maintaining, or holding themselves out to the public as operating or maintaining a maternity hospital or home, a boarding home as defined by K.S.A. 65-502 and K.S.A. 65-503, or for acting as a placement agency for juveniles under the age of sixteen (16) until a valid license therefor was obtained from the

State Department of Health and Environment, pursuant to K.S.A. 65-504.

The restraining order further prohibited Defendants from bringing into or receiving within the State of Kansas, children under the age of eighteen (18) for placement in foster care within Kansas until they had complied with all of the requirements of The Interstate Compact On The Placement of Children, K.S.A. 38-1201 et seq.

The application for temporary injunction and the Motion to Dissolve the Restraining Order were heard on July 11, 1977, and taken under advisement. The Court overruled the Motion to Dissolve and granted the temporary injunction.

A Motion to Modify the Order for Temporary Injunction was filed by the Defendants on July 22, 1977. Thereafter, discovery took place in the case in the form of requests for production of documents, requests for admissions, interrogatories, and depositions. On August 5, 1977, the Court heard the Motion to Modify, took the matter under advisement, and refused said Motion on August 24, 1977.

A pretrial conference was held in the matter on November 1, 1977. A Pretrial Order resulted from said conference, narrowing the scope of the trial and clarifying the issues. The actual trial of the matter began on November 14, 1977, and concluded November 18, 1977. Final arguments were heard, and the Defendants, as stated previously, prepared and presented an able and exhaustive Brief.

Defendants, from the outset, have declared that all of their activities are religious in nature; that they have not violated K.S.A. 65-501, et seq. or K.S.A. 38-1201, et seq.; that they are protected by the First and Fourteenth Amendments to the U.S. Constitution as well as Section 7 of the Bill of Rights to the Constitution of the State of Kansas.

Defendants further, but not as strenuously, allege: that the attempt by the Plaintiff constitutes an unconstitutional restriction on travel; that Plaintiff is guilty of laches; that Kansas failed to gain the consent of Congress prior to entering into the Interstate Compact on the Placement of Children; that the Plaintiff is not the real party in interest; and that a claim is not stated upon which can be granted.

The Plaintiff brings this action pursuant to the authority of K.S.A. 60-901, et seq. These statutes set out the procedure for obtaining injunctions in Kansas.

The Pretrial Conference Order filed herein sets out the following stipulations of the parties:

> (1) Heart Ministries, Inc., is a religious, non-profit corporation, organized under the laws of the State of Kansas;
>
> (2) That a dormitory located at Victory Village is presently under construction by the Defendants, Heart Ministries, Inc., and that, to date, the dormitory has not been completed or used by the Defendants;
>
> (3) On June 17, 1977, Brenda Buffington, Debbie Woodall, Joyce Semrau, and Rochell Baker were attending a school conducted by the Defendant at a facility commonly referred to as Victory Village Home For Girls; that on said date, the four minor girls were taken into custody from the immediate vicinity of the exits at Convention Hall, Hutchinson, Kansas;
>
> (4) All of said girls were placed with Heart Ministries, Inc., by their parents or other guardians exercising control;
>
> (5) That Victory Village Home For Girls is not a separate legal entity, the name being used by Heart Ministries, Inc., to describe one of the ministries of the organization, and is, therefore, stricken as a Party Defendant from this lawsuit;

(6) Heart Ministries, Inc., nor any of the other Defendants hold a license from the Department of Health and Environment under K.S.A. 65-504 to maintain:

(a) a maternity hospital or home;

(b) a home for infants under age 3;

(c) a home for children under age 16.

The questions of fact to be determined by the Court are also set out in the Pretrial Conference Order as follows:

(1) The religious beliefs of Heart Ministries, Inc.;

(2) Whether the activities of Heart Ministries, Inc., are religious in nature, and in fact, so as to afford them protection under the First and Fourteenth Amendments to the Constitution of the United States and Section 7 of the Bill of Rights of the State of Kansas;

(3) Are the ministries, which are the subject matter of this lawsuit, operated by Heart Ministries, Inc., pursuant to legitimate Biblical convictions;

(4) Are these Biblical convictions legitimate, and truly held, and consistently practiced by Reverend Bill Cowell, and those participating in the ministries of Heart Ministries, Inc.;

(5) Have these convictions been the lifestyle and the basis of all actions in the ministries of Heart Ministries, Inc.;

(6) Are these convictions totally based on Biblical teachings and practices dating back to the historic record of the Old Testament, and have they been truly held and practiced by large numbers of Christian believers throughout the ages to the present;

(7) Would requiring the Defendants to comply with the rules and regulations of the Department of Health and Environment, as it applies to boarding homes, maternity homes, and placement agencies, cause Defendants to depart from their religious convictions;

(8) What, if any, compelling State interest is there justifying the State to regulate Defendants' ministry and lifestyle in spite of their religious convistions;

(9) If such a compelling State interest exists, can those interests be otherwise served by some less restricting measure?

Lastly, the Pretrial Conference Order sets out the questions of law to be decided by this Court:

(1) Whether K.S.A. 65-501, et seq., is unconstitutional on its face, and as it applies to the Defendants by violating their rights, privileges, and immunities under the First, Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States, and Section 7 of the Kansas Bill of Rights;

(2) Are regulations of the Department of Health and Environment, currently in effect, as they apply to maternity homes and hospitals, homes for children under 16, including foster homes, boarding homes, and residential centers, and child placement agencies, unconstitutional on its face and as applied to the Defendants by violating their rights, privileges, and immunities under the First, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States and Section 7 of the Kansas Bill of Rights;

(3) Whether K.S.A. 38-1201, and 38-1202 are unconstitutional as violating the privileges and immunities clauses of the Fourteenth Amendment and the Commerce Clause;

(4) Whether or not an injunction should be issued by the Court to enjoin Defendants from violations of law as maintained in Plaintiff's Petition and as sought in the Prayer contained therein?

All pertinent statutes and constitutional clauses are set out as follows:

K.S.A. 60-901:

"Injunction is an order to do or refrain from doing a particular act. It may be the final judgment in an action, and it may also be allowed as a provisional remedy."

K.S.A. 60-902:

"When it appears by a verified pleading or affidavit that a party is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to a party; or when during the litigation it appears that a party is doing or threatens or is about to do, or is procuring or suffering to be done, some act in violation of a party's rights respecting the subject of the action, or tending to render the judgment ineffectual, an order may be granted to restrain such act."

K.S.A. 60-903:

"(a) No notice or bond required. A restraining order may issue without notice or bond, except as provided in K.S.A. 60-904(b), but if it appears to the judge that a restraining order may result in damage to the party restrained, a bond to secure payment of any damages sustained may be required. An application for a restraining order shall also be considered as an application for a temporary injunction

and either party may give notice of hearing thereon. The order shall remain in force until the hearing on the application for a temporary injunction.

(b) Service. Where a restraining order is issued without notice it shall be served upon each party restrained in the manner prescribed for serving a summons."

K.S.A. 60-905:

"(a) Notice and hearing. No temporary injunction shall be granted until after reasonable notice to the party to be enjoined and an opportunity to be heard.

(b) Bond. Unless otherwise provided by statute, no temporary injunction shall operate unless the party obtaining the same shall give an undertaking with one or more sufficient sureties in an amount fixed by the judge and approved by the Clerk of the court, securing to the party injured the damages he or she may sustain including attorney fees if it be finally determined that the injunction should not have been granted."

K.S.A. 60-906:

"Every order granting an injunction and every restraining order shall set forth the reasons for its issuance, shall be specific in terms; shall describe in reasonable detail, and not by reference to the Petition or other document, the act or acts sought to be restrained; and shall be binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in concert or participation with them who receive actual notice of the order by personal service or otherwise. The order may be issued and served on Sunday or on a legal holiday."

K.S.A. 65-501:

"On or after July 1, 1919, it shall be unlawful for any person, firm, corporation or association to conduct or maintain a maternity hospital or or home, or boarding, receiving or detention home for infants under three (3) years of age or for children under sixteen (16) years of age as herein defined, without having in full force a written license thereof from the Secretary of Health and Environment: Provided, that nothing in this act shall apply to any state institution maintained and operated by the state."

K.S.A. 65-502:

"The term maternity hospital or home as used in this act shall mean a house or other place maintained or conducted by anyone who advertises himself or who holds himself out as having or conducting such a home or place as a maternity hospital or home; or a house or any other place in which any person receives, cares for or treats one or more women during pregnancy, or at or after delivery, except women related to him by blood or marriage: Provided, however, that nothing in this act shall apply to a regular hospital other than a maternity hospital, and that nothing herein shall be construed to prevent a nurse from practicing her profession in the care of a patient in the home of a patient."

K.S.A. 65-503:

"The term boarding home for infants or children as used in this act shall mean a house or other place conducted or maintained by anyone who advertises or holds himself out as conducting such a place as a boarding house or home for infants or children; or who has in his control or custody one or more infants under three years of age or children under sixteen

years of age unattended by parent or guardians for the purpose of providing such children with food or lodging, or both, except children related to him by blood or marriage, or legal adoption; or any children's home, orphanage, day nursery or other institution; or association, organization or individual engaged in receiving, caring for, or finding homes for orphans, dependent or neglected children; or any receiving or detention home provided or maintained by, or receiving aid from any city or county or the state."

K.S.A. 65-504:

"The Secretary of Health and Environment shall have the power to grant license to a person, firm, corporation or association to maintain a maternity hospital or home or a home for infants under three (3) years of age, or children under sixteen (16) years of age. The license shall state the name of the licensee, describe the particular premises in or at which the business shall be carried on, whether it shall receive and care for women or infants or children that may be treated, maintained, boarded or cared for at any one time. No greater number . . . than is authorized in the license shall be kept or disposed of in a building or place not designated in the license. The license shall be kept posted in a conspicuous place in the hospital or house in which the business is conducted. No . . . term exceeding one year; . . . grant no license . . . until careful inspection . . . shall have been made; and until such . . . home . . . has complied with all the requirements of this act. No license shall be granted without the approval of the secretary of social and rehabilitation services. In all cases . . ., an investigation of said home shall be made under the supervision of . . . social and rehabilitation services . . . they shall have the right of entry and access to the

. . . home and to any information . . . necessary to . . . said investigation."

K.S.A. 65-505 provides for the license fees to be paid.

K.S.A. 65-506 deals with unlicensed homes, and restrains the placement of children or patients therein by certain officials.

K.S.A. 65-507 requires the licensee to keep records on children or patients, including names, ages, physicians, addresses of parents or guardians, etc.

K.S.A. 65-508 requires the home to be properly heated, plumbed, lighted and ventilated. Strict regard is to be taken for the health, comfort, safety, and social welfare of the children. Combs, towels, toothbrushes, drinking cups shall be provided each individual. Fire extinguishers are required.

K.S.A. 65-512 provides for inspection of the homes every six months.

K.S.A. 65-514 sets out the penalties for violations of K.S.A. 65-501 to K.S.A. 65-515.

K.S.A. 65-515:

"The county attorney of each county in this state is hereby authorized and required, upon complaint of any authorized agent of the secretary of health and environment, to file complaint and prosecute to the final all actions or proceedings against any person under the provisions of this act."

K.S.A. 38-1201:

"It is hereby found and declared: (1) that finding suitable homes for children who have lost or never had them requires the full attention and resources of the State of Kansas; (2) that the needs of children and of

adults cannot be met by restricting child placement services and supervision to the State of Kansas; (3) that would-be parents and children have need for love and security and fulfillment that can be met only when children in need of placement are matched with adults who can care for them; (4) a variety of circumstances makes interstate placements of children essential and offers compelling reasons for an interstate compact under which the jurisdictional, administrative and human rights and obligations involved can be protected.

It shall therefore be the policy of this state, in adopting the interstate compact on the placement of children, to cooperate fully with other states in providing that no children shall be sent or brought into any other party state for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this interstate compact."

Article I of the Compact sets out the purposes and policies outlined in K.S.A. 38-1201.

Article II outlines the definitions used in the Compact.

Article III specifically outlines the conditions for placement of a child under the Compact.

Article IV provides as follows:

"The sending, bringing, or causing to be sent or brought into any receiving state of a child in violation of the terms of this compact shall constitute a violation of the laws respecting the placement of children of both the state in which the sending agency is located or from which it sends or brings the child and of the receiving state. Such violation may be punished or subjected to penalty in either jurisdiction in accordance with its

laws. In addition to liability for any such punishment or penalty, any such violation shall constitute full and sufficient grounds for the suspension or revocation of any license, permit, or other legal authorization held by the sending agency which empowers or allows it to place, or care for children."

K.S.A. 38-1206:

"The courts, departments, agencies and officers of this state and its subdivisions shall enforce this compact and shall do all things appropriate to the effectuation of its purposes and intent which may be within their respective jurisdictions."

Amendment 1. U.S. Constitution: (in part)

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

Amendment 5. U.S. Constitution: (in part)

"No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

Amendment 9. U.S. Constitution:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Amendment 14. U.S. Constitution: (in part)

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 7, Bill of Rights, Kansas Constitution

"The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode of worship . . ."

The central figure in this case is Reverend William Cowell, Defendant, who resides east of Hutchinson, Reno County, Kansas, at East Avenue G and Victory Road. Reverend Cowell was born in Clay County, Kansas, in July of 1939, the son of Christian parents. A farm boy, he accepted Christ as his personal savior in June of 1947, at the age of eight. He attended a one-room rural elementary school in Clay County, Kansas, and graduated from Clay Center High School in 1957. That same year he enrolled at Kansas State College (now University) in Manhattan. Along with an agricultural course, the young Cowell also took some courses at nearby Manhattan Bible College, where he seemingly got "the call" for the ministry. Receiving a B.S. in agronomy from K-State in 1961, he entered Wheaton School of Theology in Illinois. While attending Wheaton, he toiled among the destitute souls who inhabit Chicago's Skid Row on South State Street and West Madison Avenue.

Reverend Cowell received his Bachelor of Divinity, a graduate degree, from Wheaton in 1965. In July, 1963, he married the present Mrs. Cowell who he had met at the Moody Bible College in Chicago. Five children have been blessed to this union. Through his college years and seminary years, Reverend Cowell pursued his ministry as a preacher in Kansas, and in Illinois, helping the drunks, the deviates, the down-and-out, the street people. His wife

helped in these pursuits also, having completed 1 1/2 years at Moody Bible College and gaining some credits at Wheaton.

Following his graduation from Wheaton in the summer of 1965, Reverend Cowell became a pastor of Calvary Baptist Church in Hoisington, Kansas. He remained there for three years and two months, laboring in the pastoral field, working with children, and visiting those in jail. From Hoisington this man was called to Marion, Kansas, where he pastored the Emmanuel Baptist Church for some three-and-a-half years. It was there, in Marion, Kansas, where the third Defendant herein, Heart Ministries, Inc., was born.

It was inevitable from his birth to Christian parents, his early acceptance of Christ, his years of prayer and preparation for the ministry, his Christian marriage, his concern for the plight of the suffering and the down-and-out that Reverend Cowell and his wife would open up their home for children. Their first experience was the placement of a fourteen-year-old boy in their home by the Probate Judge of Marion County with the help of a local attorney. No mention was made at that time of the need for a license from S.R.S. From this time on, the Cowells began taking other children into their home. Their special ministry began to focus upon young girls. They counseled with them spiritually and ministered to their physical needs. A building was purchased in Marion to house unwed mothers.

The Articles of Incorporation for Heart Ministries, Inc., were executed in Marion County, Kansas, on November 1, 1971. The Articles were filed with the Secretary of State for the State of Kansas on November 5, 1971. The entity was organized "Not for profit", and the nature of its business was proclaimed in the Fifth Article thereof:

"to provide housing, facilities, care and detention for wayward, homeless or delinquent individuals . . . to preach the Word of God, lead individuals to trust Christ as Saviour and Lord, reach out with His love and compassion to those whose lives have been broken and marred by sin, and thus rescue the perishing. As the Lord leads, homes shall be established and scriptural methods shall be used as necessary in order to accomplish this purpose."

The Articles of Incorporation then set out at length the fundamental religious beliefs upon which the corporation is grounded, namely:

"1. The Scriptures of the Old and New Testaments were verbally inspired by God, inerrant in the original writing, and they are our supreme and final authority in faith and life.

2. There is One God, eternally existing in three persons: Father, Son, and Holy Spirit.

3. Jesus Christ was begotten by the Holy Spirit, born of the Virgin Mary, and is true God and true Man.

4. Man was created in God's image. He sinned and thereby incurred both physical and spiritual death. All human beings are born with a sinful nature and those who reach moral responsibility become sinners in thought, word, and deed.

5. The Lord Jesus Christ died for our sins as a representative and substitutionary sacrifice. All who believe in Him and trust Him as personal Saviour are justified on the ground of His shed blood.

6. Jesus Christ arose bodily and ascended into heaven and in His present life there is our High Priest and Advocate.

7. Our Blessed Hope is the personal, premillenial and imminent return of our Lord and Saviour, Jesus Christ.

8. All who receive by faith the Lord Jesus Christ are saved by grace, being born again of the Holy Spirit, become children of God, and are expected to manifest their new life in Christ in thought, word and deed.

9. There will be a bodily resurrection of the just and the unjust, an everlasting blessedness of the saved in heaven and an everlasting conscious punishment of the lost in hell."

The last paragraph in the Fifth Article of the corporate charter is especially significant in the case at hand:

"The authority granted by virtue of these articles shall not under any circumstances give to the corporation the right to violate any applicable laws, rules or regulations."

Reverend Cowell affixed his signature to these articles on November 1, 1971.

The evidence and testimony at the trial of this matter show that Reverend Cowell become deeply involved in the possibility of starting a home for unwed mothers and delinquents around the time the corporation, Heart Ministries, Inc., was formed. That was November, 1971. A steady stream of correspondence flowed between Reverend Cowell and health officials dealing with the possibility of starting some type of home for wayward girls and the licensing thereof. Throughout this period of time the Court can find no mention of religious objection to the securing of a license on the part of Reverend Cowell. In fact, there is an abundance of evidence indicating his desire to comply with the regulations and to secure a proper

license. The first time that this Court can find, from the testimony or the evidence, that he had a religious objection to the procuring of a license was when the formal Motion to Dissolve and Vacate the Restraining Order was filed on June 30, 1977. Up until that time, as previously stated, there is a definite pattern indicating Reverend Cowell's willingness to comply with licensing requirements.

The Court would be remiss if it did not pause at this point and remark upon the amazing length of time it took to bring this matter to a head. It seems that the Health officials, the Welfare officials, the Attorney General's office, the local County Attorney's Office, and others seemed to be condoning the Defendant's lack of having a license. No one really did anything. A steady stream of correspondence is all there is to show for some six years of jostling and talking about finally obtaining a license.

The licensing requirements and the resulting regulations were enacted, obviously, to provide for the care, protection, and development of children while they are in foster homes, residential centers or boarding homes. The interstate compact has the welfare of children as its ultimate interest also.

Turning now to the questions of fact to be decided herein, all in addition to the stipulated facts set out previously in this opinion, the Court finds:

1. That the religious beliefs of Heart Ministries, Inc., are those set out in the Fifth Article of the Articles of Incorporation of said entity, and reiterated earlier in this opinion (See page 16);

2. That the activities of Heart Ministries, Inc., are religious in nature, and in fact, and, as such, should be afforded the protection of the First and Four-

teenth Amendments to the U.S. Constitution and Section 7 of the Bill of Rights of the State of Kansas;

3. That the ministries operated by Heart Ministries, Inc., are pursuant to legitimate Biblical convictions;

4. That these Biblical convictions are legitimate, truly held, and consistently practiced by Reverend Bill Cowell, and those participating in the ministries of Heart Ministries, Inc.;

5. That these Biblical convictions have been the life-style and the basis of nearly all actions in the ministries of Heart Ministries, Inc.;

6. That these convictions are almost totally based on Biblical teachings and practices dating back to the Old Testament, and they have been truly held and practiced by large numbers of Christian believers throughout the ages to the present;

7. That requiring the Defendants to comply with the rules and regulations of the Department of Health and Environment, as it applies to boarding homes, maternity homes, and placement agencies, would cause them to depart from their religious convictions;

8. That the compelling State interest, claimed by the Plaintiff to justify its regulation of the Defendants' ministries and lifestyle in spite of their religious convictions, is its concern, as parens patriae, for the care, protection, and development of children while they are in foster homes, residential centers, or boarding homes; and, further, its same interest in the welfare of children being placed interstate.

9. That the compelling State interests set out in (8) above cannot be otherwise served by some less restricting measures.

Before setting out the conclusions of law governing this case the Court makes the following comments: Under the U.S. Constitution and the Constitution of Kansas, the right of each individual or person to believe in anything he or she chooses is not open to question. Religious beliefs do not have to be logical, consistent, or even acceptable by other people. The Government cannot question their truth or falsity. What may appear to you or I as an incredulous religious belief still merits the protection of the Bill of Rights. Popularity of the belief is not a correct measure. Man's relation to his God is his own business, not that of the State or Government.

However, when an individual seeks to act upon a belief, and his action poses a threat or an inconvenience to other citizens, or to an aspect of public law, then the very nature of an orderly society requires the Courts to look into the matter. Once the Court is convinced of the sincerity of the individual's belief, and that those beliefs are religiously founded, then the Court must balance those individual beliefs and actions against legitimate State interests.

This Court has diligently read every Biblical citation presented to it by the Defendants and the State. It should be noted that every single citation, given by both sides, related to, or was authority for, the position for which it was offered. A list of some of the pertinent citations researched by the Court are set out in a separate addendum to this opinion.

Further, the Court has diligently read all of the legal citations offered by both parties to this lawsuit. Those cases are also listed in a separate addendum hereto.

Also, the Court has read all of the regulations of the Kansas Department of Health and Environment for foster homes, group boarding homes, and residential centers.

What is involved, then, is a balancing of the interests of the Defendants in the free exercise of their religion against the governmental interest in the challenged statutes and regulations. The gain to the State must outweigh the loss of the Defendants' protected rights.

This Court had no trouble in finding the sincerity of the Defendants' beliefs or the holding thereof. The Court had no trouble in finding that the State has a genuine interest in the care, treatment, and protection of children in the types of homes in question. Therefore, a real First Amendment, free-exercise-of-religion issue exists herein. In this type of case, the State has the burden of proving the need for the regulation of religious actions. Encroachment of religious freedoms can only be justified for the gravest of abuses.

In the case at hand, the Court notes that only since the filing of the Petition herein have the Defendants complained of their resistance to obtaining a license on religious grounds. The Court notes that since 1971 the Defendants have been involved, on different occasions, in the housing of pregnant girls; the placing of the offspring up for adoption; the housing of children under sixteen years of age, both from Kansas and from without; the beating of children; the restriction of children's mail, communication, mode of dress, freedom of religion, and even limiting their education; the placing of children from outside the State of Kansas to foster homes in this State; using children to raise funds for its ministry.

In all of these incidents mentioned in the last paragraph, the State has a legitimate interest. The requiring of a license for persons who are to operate a foster home, a boarding home, or a residential center for children under

sixteen is, in this Court's opinion, a legitimate exercise of the police power of the State. It is a *compelling* State interest, and one which is reasonable. The State has a right to determine the purpose of such homes; their administration; their financing, services, and staffing; the safety of children is of paramount interest to the State. The license permits members of the Department of Health and Environment; the Social and Rehabilitation Services, and the State Fire Marshal's Office, to inspect the premises for their areas of concern.

Considering the entire background of the Defendants herein, and the interest that the State has in the welfare of young children, this Court cannot conceive that the requirement of a license for operating a group boarding home should yield to the First Amendment Rights of Defendants.

The Court therefore concludes, as matters of law:

1. That K.S.A. 65-501, et seq., is not unconstitutional on its face, as it applies to the Defendants, and does not violate their rights, privileges, and immunities under the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution, or under Section 7 of the Kansas Bill of Rights;

2. That the regulations of the Kansas Department of Health and Environment, currently in effect, and as they apply to maternity homes and hospitals, homes for children under sixteen, including foster homes, boarding homes, and residential centers, and child placement agencies, are not unconstitutional on their face and as applied to the Defendants herein, and do not violate their rights, privileges, and immunities under the First, Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States, or Section 7 of the Kansas Bill of Rights;

3. That K.S.A. 38-1201 and K.S.A. 38-1202 are not unconstitutional as violating the privileges and immunities clauses of the Fourteenth Amendment and the Commerce Clause;

4. That a permanent injunction should be issued by this Court enjoining the Defendants from violations of law as maintained in Plaintiff's Petition, and as sought in the prayer contained therein.

[JUDGMENT]

It Is Therefore Ordered, Adjudged and Decreed that the Defendants are permanently enjoined and restrained from operating, maintaining, or holding themselves out to the public as operating or maintaining a maternity hospital, or home, or boarding home as defined by K.S.A. 65-502 and K.S.A. 65-503; or from acting as a placement agency for juveniles under the age of sixteen (16), at, in, or upon the premises located at East Avenue "G" and Victory Road, near the City of Hutchinson, Reno County, Kansas, or anywhere else located within the confines of Reno County, Kansas, until further order of this Court.

It Is Further Ordered, Adjudged, and Decreed that the Defendants are permanently enjoined and restrained from bringing into or receiving within the State of Kansas children under the age of eighteen (18) for placement in foster homes or foster care within this State, as defined under K.S.A. 38-1201 et seq., Interstate Compact on Placement of Children, until further order of this Court.

Finally, It Is Ordered that the costs of this action be assessed to the Defendants.

/s/ Richard J. Rome
Richard J. Rome
Associate District Judge

Dated: April 21, 1978

ADDENDUM I

(BIBLICAL)

Finances—God Will Provide

1. *Philippians 4:4-19*

   v. 4 : Rejoice in the Lord always; again I say, rejoice.

   v. 19: But may my God supply your every need according to his riches in glory in Christ Jesus.

Personal Admonition—Good Samaritan

2. *St. Luke 10:25-37*

   v. 27: Thou shalt love the Lord thy God with thy whole heart, and with thy whole soul, and with thy whole strength, and with thy whole mind; and thy neighbor as theyself.

Good Samaritan Parable—Who Is My Neighbor?

   v. 37: Go and do thou also in like manner.

Last Judgment

3. *St. Matthew 25:31-46*

   v. 35: For I was hungry and you gave me to eat; I was thirsty and you gave me to drink; I was a stranger and you took me in;

   v. 36: Naked and you covered me; sick and you visited me; I was in prison and you came to me;

   v. 40: 'Amen I say to you, as long as you did it for one of these ,the least of my brethren, you did it for me.'

v. 41: Judges the damned

v. 45: Reverse of 40 (not)

4. *Romans 12:13*

Share the needs of the saints, practising hospitality.

Job 31:32

The stranger did not stay without, my door was open to the traveller.

School

5. *Deuteronomy 6:3-9*

v. 5 : Love the Lord thy God with thy whole heart, and with thy whole soul, and with thy whole strength—

v. 6 : And these words which I command thee this day, shall be in thy heart:

v. 7 : And thou shalt tell them to thy Children, and thou shalt meditate upon them sitting in thy house, and walking on thy journey, sleeping and rising.

v. 8, 9 Hands, eyes, written in the house—

Exploitation—Singing

6. *Psalm 107:2-4*

v. 2 : . . . I will sing, and will give praise, with my glory.

v. 4 : I will praise thee, O Lord, among the people, and I will sing unto thee among the nations.

Giving Public Testimony

7. *Romans 10:9-10*

v. 9 : For if thou confess with thy mouth that Jesus is the Lord, and believe in thy heart that God has raised him from the dead, thou shalt be saved.

v. 10: For with the heart a man believes unto justice, and with the mouth profession of faith is made unto salvation.

Bible—Word of God

8. *2 Timothy 1:3-17*

v. 10: . . . He has destroyed death and brought to light life and incorruption by the Gospel.

Bible—Inspired, Written, Infallible Word of God

9. *1 Corinthians 3: 11*

v. 11: For other foundation no one can lay, but that which has been laid, which is Christ Jesus.

St. Luke 24:27

v. 27: And beginning then with Moses and with all the Prophets, he interpreted to them in all the Scriptures the things referring to himself.

Trinity

10. *St. Mark 1:10-11*

v. 9 : Jesus baptized by St. John

v. 10: And immediately on coming up from the water he saw the heavens opened and the

Spirit, as a dove, descending and remaining upon him.

v. 11: And there came a voice from the heavens, "Thou art my beloved Son, in thee I am well pleased."

Divine Creation

11. *Genesis 1:1*

v. 1 : In the beginning God created heaven, and earth.

St. John 1:1

v. 1 : In the beginning was the Word, and the word was with God; and the Word was God.

Colossians 1:15-20

v. 16: For in him were created all things in the heavens and on the earth, things visible and things invisible, whether Thrones, or Dominations, or Principalities, or Powers. All things have been created through and unto him.

Total Depravity of Man

12. *Romans 3:10*

v. 10: As it is written, there is not one just man;

Virgin Birth

13. *St. Luke 1:26-37*

v. 31: Behold, thou shalt conceive in thy womb and shalt bring forth a son; and thou shalt call his name Jesus.

v. 34: . . . "How . . ., since I do not know man?"

v. 35: . . ., "The Holy Spirit shall come upon thee . . ."

v. 37: . . .; be it done to me according to they word." . . .

Separation of Church and State

14. *St. Matthew 22:21*

v. 21: They said to him, "Caesar's." Then he said to them, Render, therefore, to Caesar the things that are Caesar's and to God the things that are God's."

See also: *Romans 13:7*

Faith Without Works

15. *St. James 2:17-20*

v. 17: So faith too, unless it has works, is dead in itself.

v. 20: . . ., that faith without works is useless?

v. 26: For just as the body without the spirit is dead, so faith also without works is dead.

True Charity

1 St. John 3: 16-18

v. 16: In this we have come to know his love, that he laid down his life for us; and we likewise ought to lay down our life for the brethren.

v. 17: He who has the goods of this world and sees his brother in need and closes his heart to him, how does the love of God abide in him?

v. 18: My dear children, let us not love in word, neither with the tongue, but in deed and in truth.

Obedience

16. *Ephesians 6:1-4*

v. 1 : Children, obey your parents in the Lord, for that is right.

v. 4 : And you, fathers, do not provoke your children to anger, but rear them in the discipline and admonition of the Lord.

Corporal Punishment

17. *Hebrews 12:6*

v. 6 : For whom the Lord loves, he chastises; and he scourges every son whom he receives.

Proverbs 22:6,15

v. 15: Folly is bound up in the heart of a child, and the rod of correction shall drive it away.

Proverbs 23:13

v. 13: Withhold not correction from a child: for if thou strike him with the rod, he shall not die.

Proverbs 23:14

Basis of All Education—Fear of Lord

18. *Proverbs 1:7*

v. 7 : The fear of the Lord is the beginning of wisdom. Fools despise wisdom and instruction.

Governing Board

19. *Book of Acts 6:1-6*

v. 1-6 . . ., "Select from among you seven men of good reputation, full of the Spirit and of

wisdom, that we may put them in charge of this work.

v. 5 : Plan met with approval (7 chosen).

v. 6 : These they set before the apostles, and after they had prayed they laid their hands upon them.

20. *Ephesians 4:1-23*

Unity in the Mystical Body
Converting Others

21. *Acts 4:12*

v. 12: Neither is there salvation in any other. For there is no other name under heaven given to men by which we must be saved.

St. John 14:6

v. 6 : Jesus said to him, "I am the way, and the truth, and the life. No one comes to the Father but through me."

Obedience to God, Primary

22. *Romans 13:1*

v. 1 : Let everyone be subject to the higher authorities, for there exists no authority except from God, and those who exist have been appointed by God.

(See: v. 2)

Hair

23. *1 Corinthians 11:14*

v. 14: Does not nature itself teach you that for a man to wear his hair long is degrading;

Civil Disobedience

24. *Daniel 3:16-18*

v. 16: The three men defy King.

v. 17: God is able to save us from the fiery furnace.

v. 18: But if he will not, be it known to thee, O king, we will not worship thy gods, nor adore the golden statute which thou hast set up.

25. *Hebrews 10:1-10*

One sacrifice supplants many.

ADDENDUM II

(LEGAL CASES)

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65-504 .....

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Fourteenth Amendment .....

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF KANSAS

NO. 50,077

HEART MINISTRIES, INC.; VICTORY VILLAGE HOME FOR GIRLS: WILLIAM COWELL AND CAROL COWELL, AS DIRECTORS AND OPERATORS OF VICTORY VILLAGE HOME FOR GIRLS, AND AS INDIVIDUALS,
Appellant,

vs.

STATE OF KANSAS, EX REL., JOSEPH P. O'SULLIVAN, COUNTY ATTORNEY, RENO COUNTY, KANSAS,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed June 13, 1980)

Notice is hereby given that Heart Ministries, Inc.; Victory Village Home for Girls; William Cowell and Carol Cowell, as Directors and Operators of Victory Village Home for Girls, and as Individuals, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of The Supreme Court of Kansas, entered in this action on March 1, 1980 (rehearing denied on April 9, 1980).

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ Lester C. Arvin
Lester C. Arvin
Attorney for Appellant

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a true and correct copy of the above and foregoing Notice of Appeal to the Supreme Court of the United States was deposited in the United States mail, postage prepaid and properly addressed to the following on this 12th day of June, 1980:

Robert T. Stephan
Attorney General
Kansas Judicial Center
301 West Tenth Street
Topeka, Kansas 66612

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Joseph P. O'Sullivan
Reno County Attorney
210 West First Street
Hutchinson, Kansas 67501

/s/ Lester C. Arvin
Lester C. Arvin

IN THE DISTRICT COURT OF RENO COUNTY, KANSAS

NO. 50,077

HEART MINISTRIES, INC.; VICTORY VILLAGE HOME FOR GIRLS: WILLIAM COWELL AND CAROL COWELL, AS DIRECTORS AND OPERATORS OF VICTORY VILLAGE HOME FOR GIRLS, AND AS INDIVIDUALS,
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/s/ Lester C. Arvin
Lester C. Arvin
Attorney for Appellant

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a true and correct copy of the above and foregoing Notice of Appeal to the Supreme Court of the United States was deposited in the United States mail, postage prepaid and properly addressed to Joseph P. O'Sullivan, County Attorney, Reno County Courthouse, 206 West First Street, Hutchinson, Kansas 67501, attorney for appellee, this 12th day of June, 1980.

/s/ Lester C. Arvin
Lester C. Arvin

APPENDIX D

Injunction Statutes - Validity Not Challenged

Article 9.—INJUNCTION

60-901. Nature of injunction. Injunction is an order to do or refrain from doing a particular act. It may be the final judgment in an action, and it may also be allowed as a provisional remedy.

60-902. Provisional remedies; when granted. When it appears by a verified pleading or affidavit that a party is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to a party; or when during the litigation it appears that a party is doing or threatens or is about to do, or is procuring or suffering to be done, some act in violation of a party's rights respecting the subject of the action, or tending to render the judgment ineffectual, an order may be granted to restrain such act.

60-903. Restraining order. (*a*) *No notice or bond required.* A restraining order may issue without notice or bond, except as provided in K.S.A. 60-904 (*b*), but if it appears to the judge that a restraining order may result in damage to the party restrained, a bond to secure payment of any damages sustained may be required. An application for a restraining order shall also be considered as an application for a temporary injunction and either party may give notice of hearing thereon. The order shall remain in force until the hearing on the application for a temporary injunction.

(*b*) *Service.* Where a restraining order is issued without notice it shall be served upon each party restrained in the manner prescribed for serving a summons.

State Statutes - Constitutional Validity Questioned

Article 5.—MATERNITY HOSPITALS OR HOMES AND HOMES FOR CHILDREN

65-501. License required. It shall be unlawful for any person, firm, corporation or association to conduct or maintain a maternity hospital or home, or a boarding, receiving or detention home for children under sixteen (16) years of age without having a license therefor from the secretary of health and environment. Nothing in this act shall apply to any state institution maintained and operated by the state.

65-502. Maternity hospital or home defined. The term maternity hospital or home as used in this act shall mean a house or other place maintained or conducted by anyone who advertises himself or who holds himself out as having or conducting such a home or place as a maternity hospital or home; or a house or any other place in which any person receives, cares for or treats one or more women during pregnancy, or at or after delivery, except women related to him by blood or marriage: *Provided, however,* That nothing in this act shall apply to a regular hospital other than a maternity hospital, and that nothing herein shall be construed to prevent a nurse from practicing her profession in the care of a patient in the home of a patient.

65-503. Boarding home defined. The term boarding home for infants or children as used in this act shall mean a house or other place conducted or maintained by anyone who advertises or holds himself out as conducting such a place as a boarding house or home for infants or children; or who has in his control or custody one or more infants under three years of age or children under sixteen years of age unattended by parent or guardians for the purpose of providing such children with food

or lodging, or both, except children related to him by blood or marriage, or legal adoption; or any children's home, orphanage, day nursery or other institution; or association, organization or individual engaged in receiving, caring for, or finding homes for orphans, dependent or neglected children; or any receiving or detention home provided or maintained by, or receiving aid from any city or county or the state.

65-504. Licenses; terms and regulations; temporary licenses; refusal to grant license; revocation; notice; appeals; procedure. The secretary of health and environment shall have the power to grant a license to a person, firm, corporation or association to maintain a maternity hospital or home, or a boarding home for children under sixteen (16) years of age. The license shall state the name of the licensee, describe the particular premises in or at which the business shall be carried on, whether it shall receive and care for women or children, and the number of women or children that may be treated, maintained, boarded or cared for at any one time. No greater number of women or children than is authorized in the license shall be kept or disposed of in a building or place not designated in the license. The license shall be kept posted in a conspicuous place in the hospital or house in which the business is conducted. No license shall be granted for a term exceeding one year. The secretary of health and environment shall grant no license in any case until careful inspection of the maternity hospital or home, or home for children shall have been made according to the terms of this act and until such maternity hospital or home, or home for children has complied with all the requirements of this act. No license shall be granted without the approval of the secretary of social and rehabilitation services.

In all cases where the secretary of social and rehabilitation services deems it necessary, an investigation of

the home shall be made under the supervision of the secretary of social and rehabilitation services or other designated qualified agents. For that purpose and for any subsequent investigations they shall have the right of entry and access to the premises of the home and to any information deemed necessary to the completion of the investigation. In all cases where an investigation is made, a report of the investigation of such home shall be filed with the secretary of health and environment. In cases where neither approval or disapproval can be given within a period of thirty (30) days following formal request for such a study, the secretary of health and environment may issue a temporary license without fee pending final approval or disapproval of the home or facility.

Whenever the secretary of health and environment shall refuse to grant a license to an applicant, he or she shall issue an order to that effect stating the reasons for such denial and within five (5) days after the issuance of such order shall notify the applicant by certified mail of such refusal by forwarding to such applicant a certified copy of the order.

When the secretary of health and environment finds upon investigation or is advised by the secretary of social and rehabilitation services that any of the provisions of this act are being violated, or such maternity hospital or home, or home for children is maintained without due regard to the health, comfort or morality of the residents, the secretary of health and environment shall after reasonable notice issue an order revoking such license and such order shall clearly state the reason for such revocation. Such revocation shall be noted upon the fac of the record and the secretary of health and environment shall give notice in writing of such revocation by forwarding a certified copy of the order to the licensee by registered or certified mail.

Any applicant or licensee aggrieved by the order of the secretary of health and environment in denying or revoking a license may appeal therefrom by filing a petition specifying the action of the secretary of health and environment appealed from, in the district court of the county in which the applicant or licensee resides, within thirty (30) days after receipt of a copy of the order of the secretary of health and environment; and the court shall have the jurisdiction to affirm, reverse, modify or vacate the order complained of if the court is of the opinion that the order was arbitrary, unlawful or unreasonable. Within seven (7) days after the petition has been filed in the district court, notice of the appeal shall be given to the secretary of health and environment and to the secretary of social and rehabilitation services by mailing certified copies of the petition, by certified mail, to the secretary of health and environment and to the secretary of social and rehabilitation services. Upon receipt of such notice, the secretary of health and environment and the secretary of social and rehabilitation services shall forthwith make available for examination and inspection to the applicant and the attorney of the applicant all their records pertaining to such matter.

From the judgment of the district court, appeal may be taken to the court of appeals as in other civil actions. An appeal to the district ocurt or to the court of appeals shall not operate to stay the effect of an order of the secretary of health and environment unless the judge or the court shal specifically allow such a stay.

65-508. Equipment, supplies and accommodations. Any maternity hospital, or home for children coming under the provisions of this act shall be properly heated, plumbed, lighted and ventilated, and shall be conducted in every department with strict regard to the health, comfort, safety and social welfare of the inmates. In all cities, towns and

villages where there is a system of waterworks and sewerage maintained for public use, every maternity hospital or home, or home for children shall be equipped with suitable toilets, lavatories, bathtubs, sinks and drains, shall be connected by proper plumbing with such water and sewerage systems, and shall be kept at all times in a clean and sanitary condition. In all cities, towns or villages not having a system of waterworks or sewerage for public use, every maternity hospital or home, or home for children shall have properly constructed privies or overvaults to receive night soil, the same to be ventilated, screened, disinfected, kept free from foul odor, all times in a clean and sanitary condition.

Every maternity hospital or home, or home for children shall furnish or cause to be furnished for the use of each resident and employee individual towel, wash cloth, comb and individual drinking cup or sanitary bubbling fountain, and toothbrushes for all other than infants, and shall keep or require such articles to be kept at all times in a clean and sanitary condition. Every maternity hospital or home, or home for children shall be provided with one fire extinguisher of a style and size approved by the state fire marshal; and every maternity hospital or home, or home for children which is more than one story high and containing and offering accommodations for, at any one time, ten (10) or more maternity patients, or ten (10) or more children, shall be provided with a suitable fire escape constructed of iron or steel, approved by the state fire marshal.

The secretary of health and environment with the cooperation of the secretary of social and rehabilitation services shall develop and adopt rules and regulations for the operation and maintenance of maternity hospitals or homes or homes for children and for the granting, suspending or revoking of licenses. The rules and regulations

for operating and maintaining maternity hospitals or homes or homes for children shall be designed to promote the health, safety and welfare of the residents who are to be served in such facilities by assuring safe and adequate physical surroundings, healthful food, supervision and care of the residents by capable, qualified persons of sufficient number, an adequate program of activities and services and such appropriate parental participation as may be feasible under the circumstances. The rules and regulations with respect to granting, suspending and revoking licenses shall be designed to promote the proper and efficient processing of matters relating to licensure to assure applicants and licensees fair and expeditious treatment under the law.

I

DEPARTMENT OF HEALTH AND ENVIRONMENT REGULATIONS IN CONFLICT WITH RELIGIOUS CONVICTIONS OF APPELLANTS

REGULATIONS:

28-4-76(2): *LICENSING PROCEDURES*

> No organization shall conduct a residential center for children under sixteen years of age or a maternity home unless licensed to do so by the Kansas state department of health and environment.

28-4-77(4): *TERMS OF LICENSE*

> The license does not give permission for placement of children.

28-4-78(1)(B): *ADMINISTRATION* (Organization)

> A copy of the articles of incorporation and by-laws shall be furnished to the Kansas state department of social and rehabilitation services. It shall include a non-discrimination statement.

28-4-78(2)(B): *ADMINISTRATION* (Governing Board)

> Members of the board shall be men and women who represent a variety of community interests so that they may interpret the services of the center to the community and the needs of the community to the center. The board members shall be chosen because of their interest in family and child welfare. Their number shall be large enough to be representative of the constituency and/or community supporting the center, yet small enough to avoid unwieldiness.

28-4-78(2)(C): *ADMINISTRATION* (Governing Board)

Board members shall be elected or appointed for a definite term of office; provision shall be made for the rotation of membership. The board shall meet monthly or as often as necessary to insure proper functioning of the center.

28-4-78(3)(A): *ADMINISTRATION* (Finances)

The residential center shall have sound and sufficient finances to insure effective services. Plans for financing the services shall be a responsibility of the governing board.

28-4-78(3)(B): *ADMINISTRATION* (Finances)

The residential center shall prepare an annual financial statement and have an annual audit by an independent public accountant. Copies of each shall be available to the Kansas state department of social and rehabilitation services within four months of the end of the center's fiscal year.

28-4-78(3)(C): *ADMINISTRATION* (Finances)

The residential center shall maintain financial records sufficient to verify resources and amounts of income, including income from residential care, and shall account for major expenditures on behalf of the child for whom payment is received.

28-4-78(3)(F): *ADMINISTRATION* (Finances)

Children shall not be exploited in campaigns or publicity efforts to raise funds.

28-4-78(4)(D): *ADMINISTRATION* (Personnel policies)

Child care personnel shall attend meetings, training sessions, etc., in order to improve their knowledge, understanding and practice of child development principles.

28-4-78(5)(E): *ADMINISTRATION* (Child, care personnel)

Child care staff and relief staff shall have a working knowledge of agency policies and current status of residents.

28-4-78(6)(B): *ADMINISTRATION* (Staff qualifications)

1. Child care staff shall be in good mental and physical health. They shall be able to offer intellectual, spiritual, and moral guidance to a child.

2. The child care staff shall possess knowledge and understanding of the needs of children and practice accepted methods of child care.

3. Child care staff with major responsibility for the residents shall have at least a high school diploma or its equivalent.

28-4-78(7)(A)(2): *ADMINISTRATION* (Records)

A list of all children receiving care shall be submitted to the bureau of maternal and child health of the state department of health and environment on quarterly roster forms provided by the bureau. The death of a child in a residential center shall be reported promptly to the bureau.

28-4-80(1)(2)(B): *SERVICES* (Discipline)

(1): Social services. There shall be a specific plan for the provision of social services for each child in care. Social services shall be provided by a private or public social agency, or through an approved social worker on the center staff.

(2)(B): Discipline. which is humiliating or frightening or physically harmful to the resident shall not be

used at any time. The resident shall be protected against all forms of neglect exploitation, or degrading forms of discipline. No resident shall be confined in any dark space nor isolated without an adult available to him. Corporal punishment shall not be used.

28-4-80(3): *SERVICES* (Education)

Education. Every resident shall be helped to secure the maximum amount of education of which he is capable and be provided the optimum conditions under which he can receive the greatest benefit from his school experience. [Alternative formal schooling provided by the residential center shall be accredited by the Kansas state department of education.]

28-4-80(4): *SERVICES* (Religion)

Religion. Each resident shall be given the opportunity to develop the foundation for a religious faith.

28-4-82(2): *MENTAL HEALTH POLICIES*

The views of the parents, the child, and the placing agent concerning those factors important to them in the emotional development of the child shall be considered by the staff in the treatment plan for the resident.

II

REGULATIONS FOR PRIVATE CHILD PLACING AGENCIES

(Authorized by KSA 65-503 and 65-508)

REGULATIONS:

28-4-160(1): *Organization*

Private child placing agencies doing business in the State of Kansas shall be incorporated.

28-4-160(2): Governing Board

(b) Members of the board shall be men and women who represent a variety of community interests so that they may interpret the services of the agency to the community, and the needs of the community to the agency. The board members shall be chosen because of their interest in family and child welfare. Their number shall be large enough to be representative of the constituency and/or community supporting the agency, yet small enough to avoid unwieldiness.

(c) Board members shall be elected or appointed for a definite term of office; provision shall be made for the rotation of membership. The Board shall meet monthly or often as necessary to insure proper functioning of the agency.

28-4-160(3): Financing

(a) The agency shall have sound and sufficient finances to insure effective services. Fund raising shall be a responsibility of the Board.

(b) Financial accounts of the agency shall be audited once a year by a certified public accountant. Copies of the audited reports shall be made available to the Division of Child Welfare, State Department of Social Welfare. (Authorized by KSA 65-503, 65-508).

28-4-162: PERSONNEL

(1) *Executive Director*

Administrative responsibility shall be vested in an executive director appointed by the Board. The executive director shall not be a member of the Board of Directors. The executive director shall have graduated from an accredited college or university. He shall be a person of proven executive ability. He shall have knowledge of current child welfare services.

2. *Casework Supervisor*

The casework supervisor shall have a master's degree from a professionally accredited school of social work. He shall be a member of the Academy of Certified Social Workers. He shall have had four years in social casework with families and children. Experience shall have included casework in an agency which offers child placement services. (Preferably his workload of supervisees should not exceed five.)

3. *Caseworker*

a. *Caseworker A*

Caseworker A shall have graduated from an accredited college and shall have completed two years of graduate study in a professionally accredited school of social work. Two years of full-time, paid employment in social casework, under qualified casework supervision with families and children, may be substituted for a single year of graduate study. The Caseworker A shall be under the supervision of a certified casework supervisor.

b. *Caseworker B*

A Caseworker B shall have a bachelor's degree with a major in social work from an accredited educational institution. The Caseworker B shall be under the supervision of a certified casework supervisor.

4. *Casework Aide*

A casework aide shall have at least a bachelor's degree from a recognized educational institution and must have a definite plan for graduate social work education. A casework aide shall function under the direct supervision of a certified casework supervisor.

5. *Consultant Services*

The agency shall arrange for a consultant staff such as psychologists, psychiatrists, teachers, professional nurses, speech therapists, and such other consultants as may be required to meet adequately the needs of the children being served.

6. *Office Staff*

There shall be a sufficient number of typists, stenographers, clerks, and bookkeeper, to maintain adequate correspondance, files, reports, and records. (Authorized by KSA 65-503, 65-508).

28-4-165: SOCIAL CASEWORK SERVICES

(1) The agency program shall be operated with strict regard for preserving the child's own home if at all possible.

(2) The agency shall have a well-defined intake policy.

(3) An Agency shall not accept children whose needs require facilities and staff beyond those which the agency is able to provide. Such children shall be referred to agencies which are able to provide these services.

(4) Formal acceptance of the child for care shall be the result of a complete study of the child's situation made according to accepted casework principles.

(5) Temporary care may be offered in an emergency pending such a study.

(6) Acceptance of out-of-state children shall be made according to the laws and procedures of the state which pertain in interstate placement of dependent and/or delinquent children.

(7) When a special need cannot be met by the agency through its own resources or resources known to it, the agency shall notify the State Department of Social Welfare and/or the State Department of Health.

(8) No child be placed in a foster home or private institution (except in a temporary emergency situation and in these instances an application shall be made at the earliest opportunity) until such facility has been licensed in accordance with KSA 65-501, 65-515. Placement shall be made in foster homes or private institutions only after they have been visited by the agency or its designated representatives, and a written report has been filed describing the conditions and suitability of the home. These homes and private institutions shall meet the requirements and regulations as set forth in the state and local laws.

(9) The agency and the foster family shall have the mutual responsibility of keeping each other informed about the adjustment, development, and progress of the children under their care. Except in exceptional circumstances, no more than one social agency shall work with a foster home at any one time. Notification of change of agency shall be made by the original agency, unless there is mutual agreement between agencies.

(10) Supervision of children placed in homes for foster care shall be maintained by the placing agency or its representative through visits made on a minimum of once per month or more frequently, if necessary, for the best interest of the child. A written record of such visits showing dates and findings shall be kept by the agency. (Authorized by KSA 65-503, 65-508).

28-4-167: EDUCATIONAL TRAINING

Children of school age in institutions or foster homes shall receive regular and suitable instruction as required by the Education Law of the State.

The agency shall refer children requiring special education and training to the existing facilities which will meet their needs (Authorized by KSA 65-503, 65-508).

28-4-168: RELIGIOUS TRAINING

The child placing agency shall provide for the religious and moral welfare of the children entrusted to its care with consideration given to the wishes of the natural parents. (Authorized by KSA 65-503, 65-508).

III

DEPARTMENT OF HEALTH AND ENVIRONMENT REGULATIONS IN CONFLICT WITH RELIGIOUS CONVICTIONS

REGULATIONS:

28-4-251(2): LICENSING PROCEDURES

No organization shall conduct a group boarding home unless licensed to do so by the Kansas State department of health and environment.

28-4-252(4): TERMS OF LICENSE

This license does not give permission for placement of children.

28-4-253(1): ADMINISTRATION

Organization:

(A) The group boarding home or its parent body shall be incorporated in the state of Kansas as a non-profit corporation or be a corporation qualified in the state and shall operate in accordance with an established constitution and by-laws.

(B) A copy of the articles of incorporation and by-laws shall be furnished to the Kansas state department

of social and rehabilitation services. It shall include a non-discrimination statement.

28-4-253(2):

Governing board:

(B) Members of the board shall be men and women who represent a variety of community interests so that they may interpret the services of the home to the community and the needs of the community to the home. The board members shall be chosen because of their interest in family and child welfare. Their number shall be large enough to be representative of the constituency and/or community supporting the home, yet small enough to avoid unwieldiness.

(C) Board members shall be elected or appointed for a definite term of office; provision shall be made for the rotation of membership. The board shall meet monthly or as often as necessary to insure proper functioning of the home.

(F) The administrator shall not be a voting member of the governing board if he or she is a paid staff member. He or she shall have a working knowledge of child development principles.

28-4-253(3):

Finances:

(A) The group boarding home shall have sound and sufficient finances to insure effective services. Plans for financing the services shall be a responsibility of the governing board.

(B) The group boarding home shall prepare an annual financial statement and have an annual audit by an independent public accountant. Copies of each shall be made available to the Kansas state department

of social and rehabilitation services within four months of the end of the group boarding home's fiscal year.

(C) The group boarding home shall maintain financial records sufficient to verify resources and amounts of income, including income from residential care, and shall account for major expenditures on behalf of the child for whom payment is received.

(F) Children shall not be exploited in campaigns or publicity efforts to raise funds.

28-4-253(5):

Qualifications of group boarding home personnel:

(A) Group boarding home personnel providing direct services to children shall be mature and well-balanced individuals who can offer examples of wholesome adult relationships to children. The group boarding home personnel is responsible for providing adequate supervision for the residents at all times.

(B) Group boarding home personnel shall be in good mental and physical health. They shall be able to offer intellectual and spiritual and moral guidance to a child.

(C) The group boarding home personnel shall possess knowledge and understanding of the needs of children, and practice accepted methods of child care.

(E) Group boarding home personnel shall attend meetings, training sessions, etc., in order to improve their knowledge, understanding and practice.

(F) Regulations for licensing group boarding homes shall be read by all personnel on the boarding home staff prior to employment and be immediately available to them at all times.

28-4-255(6): PLACEMENT AGREEMENTS

A group boarding home shall not accept permanent legal guardianship of a child unless the home is licensed as a child placing agency. (Authorized by KSA 1977 Supp. 65-508; effective, E-76-36, July 14, 1975; effective May 1, 1976).

28-4-256: SERVICES

Social services:

(1) There shall be a specific plan for the provision of social services for each child in care. Social services shall be provided by a private or public social agency, by an approved social worker on a group boarding home staff, or by a member of the group boarding home staff who has a B.A. or B.S. degree in a social services or a related field and two years experience in a social services agency.

Consultants:

(2) The group boarding home shall arrange for a consultant staff such as social workers, physicians, psychologists, psychiatrists, teachers, professional nurses, speech therapists and such other consultants as may be required to meet the needs of the residents served.

Supervision of children and youth:

(3)(B) Discipline which is humiliating or frightening or physically harmful shall not be used at any time. The resident shall be protected against all forms of neglect, exploitation or degrading forms of discipline. No resident shall be confined in any dark space, nor isolated without an adult available to him, nor be subject to corporal punishment.

Education:

(4) Every resident shall be helped to secure the maximum amount of education of which he is capable and

be provided the optimum conditions under which he can receive the greatest benefit from his school experience. Formal schooling provided by the group boarding home shall be accredited by the Kansas state department of education.

Religion:

(5) Each resident shall be given an opportunity to develop the foundation for a religious faith.

Work experiences:

(6) (A) Whenever possible, residents shall have an opportunity to earn and manage money by working, but they shall not serve as substitute staff.

IV

DEPARTMENT OF HEALTH AND ENVIRONMENT REGULATIONS IN CONFLICT WITH RELIGIOUS CONVICTIONS

REGULATIONS:

28-4-302: *TERMS OF LICENSE*

(1) The maximum number and age range of foster children who may be cared for in a foster home at any one time shall be specified on each license.

(2) The adults who care for the children shall pro- foster children with the total number of children in the home not to exceed six, including the children of the foster parents.

(3) No home shall care for more than two children under the age of two, including the family's own children under two years of age.

(4) Licenses for more than one category of child care shall not be issued concurrently to an applicant.

28-4-303: ELIGIBILITY FOR LICENSE

(1) The foster family shall have been a stable family group for a minimum of two years before date of application.

(2) The adults who care for the children shall provide evidence of their character and ability to care for children.

(3) The adults who care for children shall be between the ages of 21 and 65 at the time of application.

(4) The foster family shall have income from employment or other resources which is sufficient to maintain an adequate standard of living for the family.

(5) A foster home shall not receive a license when any member of the household is on probation, under investigation by a law enforcement agency or is known to have had a conviction of child abuse or neglect or sexual offense.

(6) A foster home shall not be eligible for a license when an adult roomer or boarder receives care in the home. (Authorized by K.S.A. 1975 Supp. 65-508; effective, E-76-36, July 14, 1975; effective May 1, 1976).

28-4-304: CARE OF CHILDREN

(1) The foster parents, in cooperation with the placing agent, shall plan for educational, recreational and cultural experiences which will promote the child's normal growth and development.

(4) The foster family's care of the child shall supplement and support the natural family-child relationship in accordance with the placement plan.

(6) The foster parents shall avoid and shall protect the foster child from any form of neglect, cruel, unusual or degrading discipline and exploitation.

28-4-306: PLACEMENT AND REMOVAL OF CHILDREN

(1)(A) A statement of financial plan for the total care of the child.

(1)(B) A written consent for medical and surgical care.

(2) The foster family shall not accept a child directly from outside the state of Kansas for foster care without prior approval of the state department of social and rehabilitation services (Authorized by K.S.A. 1975 Supp. 65-508; effective, E-76-36, July 14, 1975; effective May 1, 1976).

28-4-307(2): HEALTH CARE POLICIES

(C). *Health of members of the foster family:*

Health assessments shall be obtained on members of the household every three years. Foster parents over the age of 60 shall obtain a health assessment every year.

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No. 80-21

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October Term, 1979

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Appellants,

v.

STATE OF KANSAS, EX REL., JOSEPH P. O'SULLIVAN, COUNTY ATTORNEY, RENO COUNTY, KANSAS,

Appellee.

On Appeal From The Supreme Court Of Kansas

MOTION TO DISMISS OR AFFIRM

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The appellee, the State of Kansas, moves that the final judgment of the Supreme Court of Kansas be affirmed or that this appeal be dismissed on the ground that the federal question is so unsubstantial as to not warrant argument or briefs. As an alternative ground, this appeal should be dismissed because the notice of appeal was not filed with the Supreme Court of Kansas within the time allowed by law.

QUESTION PRESENTED

Do the Kansas state statutes, as construed, which permit state regulation of group homes for children violate the First Amendment to the United States Constitution when the group homes are operated by religious institutions?

STATUTES INVOLVED

This appeal attacks the validity of the laws relating to maternity hospitals and homes for children, found at Kansas Statutes Annotated 65-501, et seq. Many of the pertinent statutes are set out at pages A66 through A71, inclusive, in appellants' Jurisdictional Statement.

INTRODUCTION

This appeal stems from the judgment of the state District Court of Reno County, Kansas, in which the appellants were permanently enjoined from operating and holding themselves out to the public as a maternity hospital or group boarding home for children. The State of Kansas, acting on the relation of the County Attorney of Reno County, Kansas, had sought to enjoin the appellants from operating a home for children until such time as they applied for and received a license for such a home. The Kansas supreme court recognized the need for regulation of group homes for children in the case below, State of Kansas v. Heart Ministries, et al. 227 Kan. 244, 607 P.2d 1102 (1980):

> "The compelling interest of the State, as parens patriae, is the protection

> of its children from hunger, cold, cruelty, neglect, degradation, and inhumanity in all its forms. To fulfill this responsibility, the legislature has elected to impose licensing and inspection requirements. To this requirements the defendants' free exercise rights must bow; the balance weighs heavily in favor of those unfortunate children whom the State must protect." Id., at p. 257.

Appellants have contended they should be exempt from licensing requirements because Heart Ministries is also a religious organization, and to subject the group home for children to a licensing program would infringe upon the free exercise of religion as guaranteed by the First Amendment to the United States Constitution.

The judgment by the trial court in favor of appellee State was appealed, and the Supreme Court of the State of Kansas affirmed the trial court and denied a motion for rehearing. This appeal followed.

ARGUMENTS AND AUTHORITIES

Appellants have asserted there are four substantial federal questions. In reality, the sole question is whether the state statutes which require regulation of group homes for children operated by religious institutions are in violation of the First Amendment of the United States Constitution.

However, the appellants' position that their group homes for children should be exempt from licensing and regulation of the living conditions solely because the home is operated by a religious organization is patently meritless.

Under the First Amendment to the Constitution of the United States, the freedom of appellants to believe as they see fit remains inviolate, but their

freedom to act in society is not inviolate and is subject to reasonable regulation by a state (or the United States) for the protection of the society which extends the right of religious freedom. Cantwell v. Connecticut, 310 U.S. 296, 303, 304 (1940); Reynolds v. United States, 98 U.S. 145, 164 (1878). Moreover, society's interest in the reasonable regulation of acts performed in accordance with religious beliefs is broader and greater where the welfare and safety of children are involved. Prince v. Massachusetts, 321 U.S. 158, 168, 169 (1944).

In any case where the interests of freedom of religion and public welfare clash, the propriety of governmental regulation must be examined in light of the two-pronged test enunciated by Wisconsin v. Yoder, 406 U.S. 212 (1972), at page 214 of the opinion:

> . . . it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.

The regulation of group homes for children as provided in Kansas Statutes Annotated 65-501, et seq., meets either test, since:

> (1) such regulation cannot be said to "interfere with the practice of a legitimate religious belief," and
>
> (2) the "state interest" in the case of welfare of children residing in child care institutions is of sufficient magnitude to override the interest claiming protection under the First Amendment.

This Court recently dismissed a very similar case in which the Texas Child Care Licensing Act of 1975 came under a similar attack. Roloff Evangelistic Enterprises, Inc., et al. v. State of Texas, 556 S.W.2d 856, appeal dismissed 439 U.S. 803, rehearing denied 439 U.S. 998 (1978).

As an alternative ground, this Court should dismiss the appeal since the notice of appeal was not filed until over sixty days after the final judgment of the Supreme Court of the State of Kansas. See appellants' Jurisdictional Statement, Appendix, pages A25, A61. The applicable statutes are 28 U.S.C. Sec. 1257(2), 28 U.S.C. Sec. 2104, and 28 U.S.C. Sec. 2101(b).

Appellants' claim the regulation of their group home for children infringes on First Amendment rights is without merit, and the judgment below should be affirmed, or this appeal should be dismissed for want of a substantial federal question.

Respectfully submitted,

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS OR AFFIRM

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BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS OR AFFIRM

The Appellee has misinterpreted the issues before this Court, evidenced by its question presented on page 2 of its Motion to Dismiss or Affirm, to-wit:

> "Do the Kansas state statutes, as construed, which permit state regulation of group homes for children violate the First Amendment to the United States Constitution when the group homes are operated by religious institutions?"

The Appellants do not contend that the statutes and regulations are unconstitutional per se, but only as *applied to Appellants.* It is unlikely, but conceivable, that the Kansas statutes and regulations pertaining to children's homes would be compatible with every other religious organization or entity in the United States. This issue is presently not before this Court.

Appellee has misapplied the test as enunciated in *Wisconsin v. Yoder,* 406 U.S. 212 (1972):

> ". . . it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause",

and erroneously concluded that the regulations or statutes of Kansas meet those tests.

The first test in *Wisconsin v. Yoder* is whether the regulations interfere with the free exercise of Appellants' religious practices and beliefs. In the instant case involving this Appeal, the trial court answered in the affirmative, and this finding was not altered by the Kansas Supreme Court. The Supreme Court of Kansas, therefore, after concluding that Appellants' religious free exercises were being restricted, refused to balance the state interest and also refused to consider, as part of the second test, whether the interest of the state could otherwise be served by less restrictive alternatives. The Kansas Supreme Court improperly concluded that some of Appellants' practices, claimed to be religious, were secular. The effect of such ruling makes the Kansas Supreme Court the ultimate authority in deciding what is or what is not a religious activity.

The questions presented contained on pages I. and II. of the jurisdictional statement of this Appeal are the proper issues before this Court. While the fact of this case are very similar to *Roloff Evangelistic Enterprises, Inc., et al. v. State of Texas,* 556 S.W. 2d 856, appeal dismissed 439 U.S. 803, rehearing denied 439 U.S. 998 (1978), the case did not reach the Supreme Court in the same manner. Consequently, the issues raised therein have never been ruled upon and should now be ruled upon by this Court.

Appellants would respond to the alternate ground of the Motion to Dismiss or Affirm by stating that the Appeal was docketed within 90 days in accordance with the Rules of the Supreme Court of the United States. The Notice of Appeal was filed in accordance with 28 U.S.C. 2101(c). This not a direct appeal from a district court to the United States Supreme Court.

Appellants have substantially complied with the Appellate procedures, and respectfully urge that this Court deny the Motion of Appellee herein, and request an Order noting proper jurisdiction, or postponing consideration of jurisdiction to the hearing on the merits.

Respectfully submitted,

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